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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1961

No. [redacted] 45

LOU POLLER, PETITIONER,

vs.

COLUMBIA BROADCASTING SYSTEM, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 1, 1961

CERTIORARI GRANTED MARCH 20, 1961

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 15379.

LOU POLLER,

Appellant,

v.

COLUMBIA BROADCASTING SYSTEM, INC., CBS TELEVISION, J. L. VAN VOLKENBURG, and H. K. AKERBERG,

Appellees.

APPEAL FROM THE SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

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RELEVANT DOCKET ENTRIES.

Sept. 12, 1956. Complaint, appearance, Jury Demand. Filed.

Sept. 12, 1956. Summons, Copies (6) and Copies (6) of Complaint issued #1, 3, 4 ser. 9-13-56.
#2 NF 10-3.
#5, 6 NF 10-3.

Oct. 2, 1956. Notice by defts. #1, 3 and 4 for taking deposition of pltf; ser. ack. 1-2-56 c/m 10-2-56. Filed.

Oct. 2, 1956. Answer by defts. #1, 3 and 4 to complt; ser. ack.; c/m 1-2-56; app. of Leon R. Brooks as atty for defts #1, 3 and 4; c/m 10-2-56. Filed.

Nov. 6, 1956. Interrogatories to defts 1, 3 and 4; c/s 11-6-56. Filed.

Jan. 7, 1957. Appearance of William Montgomery Smith for pltf. Filed.

Jan. 23, 1957. Answer of defts 1, 3 and 4 to interrogatories; affidavit of service 1-3-57. Filed.

Feb. 19, 1957. Appearance of Ambrose Doskow for defts 1-3 and 4 (575 Madison Ave. N. Y.) Filed.

June 17, 1957. Answer of defts 1, 3 and 4 to pltfs interrogatories Nos. 23a, b and c and 29 as modified by order of 3-29-57; c/m 5-21-57.

Sept. 17, 1957. Motion of defts. CBS, Van Valkenberg & Akerberg for summary judgment; exhibits A and B; affidavits (3); M. C. Filed.

Sept. 17, 1957. Statement in support of motion for summary judgment; appendix. Filed.

Sept. 17, 1957. Deposition of Lou Poller of 10-22-56. Filed.

Sept. 17, 1957. Deposition of Lou Poller of 11-16-56. Filed.

Sept. 17, 1957. Deposition of Lou Poller of 12-11-56. Filed.

May 13, 1959. Opposition of pltf to defts. motion for summary judgment; ser. ack.; affidavit; Exhibit. Filed.

May 13, 1959.	Supplemental statement of P & A in opposition to defts motion for summary judgment; ser. acknowledged; supplemental affidavit. Filed.
May 13, 1959.	Deposition of Richard S. Salant. Filed.
May 13, 1959.	Deposition of Frank Stanton.
May 13, 1959.	Deposition of Thad Holt.
May 28, 1959.	Reply statement of defts. in support of motion for summary judgment; c/s 5-28-59. Filed.
June 9, 1959.	Order granting motion of defts for summary judgment in all respects and dismissing complt as to deft CBS, Inc. J. L. Van Valkenberg and H. V. Akerberg (n) Holtzoff, J.
June 9, 1959.	Transcript of proceedings of June 3, 1959 (Vol. 2, pages 1-52). (Rep. Gerald Nevit) (court copy). Filed.
June 12, 1959.	Opinion granting defts motion for summary judgment (N) Holtzoff, J.
June 30, 1959.	Notice of Appeal of pltf; deposit by Beneman ($5.00) (Copy mailed to Leon R. Brooks). Filed.
June 30, 1959.	Cost bond on appeal of plts in amount of $250.00 with USF & G Co. approved and Filed.
July 27, 1959.	Transcript of proceedings 6-2-59, pages 1-36 (Rep. J. Rawls) Mr. Freidman's copy. Filed.
July 27, 1959.	Transcript of proceedings 6-3-59, Vol. 2, pages 1-52 (Rep. G. Nevitt) (Pltf's copy). Filed.

July 28, 1959.	Consent order extending time to file record on appeal to Sept. 28, 1959 (N) Hart, J.
July 30, 1959.	Transcript of proceedings of June 2, 1959, pages 1-36 (Rep. J. Rawls) (Clerk's copy). Filed.
Sept. 25, 1959.	Record on appeal delivered to USCA Deposit by Beneman—$1.85.
Sept. 25, 1959.	Receipt from USCA for original papers.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA.

LOU POLLER,
838 Pennsylvania Bldg.,
Washington, D. C.
Plaintiff,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,
485 Madison Ave., New York, N. Y.
CBS TELEVISION,
485 Madison Ave., New York, N. Y.
J. L. VAN VOLKENBURG,
485 Madison Ave., New York, N. Y.
H. K. AKERBERG,
485 Madison Ave., New York, N. Y.
BARTELL BROADCASTERS, INC.,
704 W. Wisconsin Ave.,
Milwaukee, Wisconsin,

and

THAD HOLT,
701 Protective Life Building,
Birmingham, Alabama,
Defendants.

Civil Action No. 3761-56.

COMPLAINT UNDER THE ANTITRUST LAWS OF THE UNITED STATES.

Filed September 12, 1956.

The plaintiff above named brings this civil action for damages under the antitrust laws of the United States, against the defendants above named, and complains as follows:

I.

PARTIES.

1. Plaintiff is a citizen and resident of the District of Columbia, whose address is 838 Pennsylvania Building, Washington, D. C., and as is hereinafter set forth has been since December 30, 1955 and now is the assignee and sole owner of all the assets of Midwest Broadcasting Company ("Midwest"), including the right of action set forth in this complaint. Midwest until its dissolution on December 30, 1955 was a corporation duly incorporated and existing under the laws of Wisconsin, and at all the times material to this action owned and until February 25, 1955 operated in the City of Milwaukee under license from the Federal Communications Commission (FCC) the television broadcasting station WCAN-TV ("WCAN").

2. Columbia Broadcasting System, Inc. ("CBS") is a New York corporation with principal place of business at 485 Madison Avenue, New York, N. Y., and at all the times material to this action, among many other activities, directly or through an unincorporated, wholly-owned subsidiary, CBS Television ("CBS-TV"), owned and operated television broadcasting stations and a television network which consisted of the stations which it owned and of affiliated stations to which CBS-TV supplied programs. CBS may be found in the District of Columbia and has agents and transacts business in that District.

3. CBS-TV, as stated, is and at all the times material to this action was an unincorporated, wholly-owned subsidiary of CBS, with its principal place of business at 485 Madison Avenue, New York, N. Y., and is and at all such times was the agent and instrumentality of CBS through which exclusively and separately from the other unincorporated, wholly-owned subsidiaries of CBS, CBS conducts its television business. CBS-TV has its own officers and employees, and it deals with other unincorporated, wholly-owned subsidiaries of CBS on an independent third-party basis. CBS-TV may be found in the District of Columbia, and has agents and transacts business in the District of Columbia.

4. J. L. Van Volkenburg is a citizen and resident of New York City, N. Y., whose principal business address is 485 Madison Avenue, New York, N. Y., and is and at all the times material to this action was the President of CBS-TV.

5. H. K. Akerberg is a citizen and resident of New York City, N. Y., whose principal business address is 485 Madison Avenue, New York, N. Y., and is and at all the times material to this action was a Vice President of CBS-TV.

6. Bartell Broadcasters, Inc. ("Bartell") is a Wisconsin corporation, with its principal place of business at 704 W. Wisconsin Avenue, Milwaukee, Wisconsin, and at all the times material hereto was the licensee of television station WOKY-TV ("WOKY"), which it operated until on or about January 14, 1955, since which date, in the circumstances hereinafter set forth, the said station has been owned and operated by CBS-TV under the call letters WXIX-TV.

7. Thad Holt is a citizen and resident of Birmingham, Alabama, whose principal business address is 701 Protective Life Building, Birmingham, Alabama, and at all the times material hereto was a partner in the management consultant firm of Norton & Holt in that City.

II.

JURISDICTION OF COURT.

8. This action is brought under Sections 4 and 12 of the Act of Congress of October 15, 1914 (15 USCA, Section 5 and 22) as amended and supplemented, commonly known as the "Clayton Act", and Sections 1, 2 and 3 of the Act of Congress of July 2, 1890 (15 USCA, Sections 1, 2 and 3) as amended and supplemented, commonly known as the "Sherman Antitrust Act".

III.

BASIS OF COMPLAINT.

9. This action is brought under said sections because plaintiff has been injured in his business and property by reason of

(a) Contracts, combinations and conspiracies among the defendants, in restraint of trade and commerce, in the television industry among the States of the United States, and in restraint of trade and commerce in said industry in the District of Columbia, and between the states of the United States and the District of Columbia;

(b) The monopolization or attempted monopolization by the defendants, CBS and CBS-TV, of trade and commerce in the television industry among the States of the United States and in the District of Columbia, and between such States and the District of Columbia; and

(c) Conspiracies among the defendants to monopolize for CBS and for CBS-TV, or to attempt to monopolize for them, such trade and commerce.

IV.

INTERSTATE CHARACTER OF TELEVISION INDUSTRY.

10. The television industry and the activities therein of the parties hereto, involved in the present action, constitute interstate commerce. These activities on the part of CBS, CBS-TV, J. L. Van Volkenburg and H. K. Akerberg have included at all the times material hereto, and still include (a) the creation and production of programs in various States of the United States and in the District of Columbia, which consist in part of actual events occurring therein and in part of persons and property transported from various States and the District of Columbia to the places in other States and the District of Columbia where the program is created; (b) the inter-communication of such programs from such places to television broadcast stations throughout the United States (including the stations owned and operated by CBS and CBS-TV) by means of telephone cables and microwave relay systems, as well as the transportation and delivery from various States and the District of Columbia to such television broadcast stations, of motion picture films and phonograph records; and finally (c) the broadcasting of such programs by the television broadcast stations in the various States and the District of Columbia to listeners located in many cases outside the State in which the broadcast station is located.

11. Defendant, Bartell Broadcasters, Inc., and Midwest owned and operated television broadcast stations at Milwaukee, Wisconsin, as herein stated, in the course of which they received programs for television broadcasting from different States of the United States and the District of Columbia, and broadcast such programs to listeners located outside of Wisconsin. They also caused to be transported to Milwaukee from various States other than Wisconsin motion picture films and phonograph records for use

in connection with their television broadcasts, and caused the same to be transported from Milwaukee to other States and the District of Columbia.

V.

TELEVISION INDUSTRY TERMS USED HEREIN.

12. In the television industry, the following terms were used at all the times material hereto and still are used, with the following meanings:

"Affiliation" is the relation established by an agreement between a national television broadcasting network and a local broadcasting station, in which the network agrees to supply the station network-sponsored broadcasting programs including spot advertisements which the network's client-advertisers wish to have broadcast by the station. The station agrees in general to accept and broadcast such programs as the network asks the station to broadcast during specified periods of the day (called "network option time"). The periods thus available to the network are in general those most valuable to the advertising clients of the network because they are the periods during which the station is likely to have the greatest listening audience. The network agrees to pay the station for the use of the station's time during which the network's sponsored programs are broadcast, at specified rates, dependent in general on the value to the network's client-advertisers of the probable listening audience of the station.

"Network" is a national television broadcasting organization which has affiliation as above described with local stations throughout the United States and which for that reason is able to offer its clients the broadcasting of their advertisements in many localities. The wider this coverage, the greater is the value of advertising through the network. The greater this value, the larger is the advertising revenue

of the network, and therefore the greater is the financial ability to create and produce expensive programs which enjoy great popularity with television audiences.

VI.

DEPENDENCY OF STATIONS ON AFFILIATION WITH A MAJOR NETWORK

13. At all times material to this action, the only national broadcasting networks operating in the United States were CBS-TV, National Broadcasting Company ("NBC") and, to a minor degree, American Broadcasting Company-Paramount ("ABC"), and DuMont Television Network (until December 1954). These four networks, and after the di integration of DuMont, the remaining three networks, thr ugh ownership of stations and affiliation with other stati s, completely monopolized the local outlets for television roadcasting throughout the United States which were of any value for national advertising by television.

In 1954 and 1955 (and to an even greater extent in 1956) the three networks had affiliations with 90% of the operating commercial stations in the United States, and controlled, through their own stations and those of their affiliates, the prime viewing time (evening) on these local stations.

From the standpoint of net income, the number of stations controlled by a network is much less important than the relative position in the advertising market of the stations controlled.

In 1954, in the 20 most important—from an advertising value standpoint—of the local television broadcasting markets in the United States (hereinafter referred to as "Class A" markets), CBS and NBC, with only 38 affiliates, received 87.3% of the total broadcast income before federal taxes. Of this total the CBS affiliates' income was 46.85%. This combined income of CBS and NBC affiliates is equal to 69.1% of the total net income of the entire 410 stations

in the United States if losses of stations are included. If, to the net income of the 38 affiliates, the net income from the network operation is added, the combined income of CBS and NBC in these 20 markets comes to 89.3% of the total television industry net income of the United States if losses are included.

In 1954 CBS had a net income before taxes of 61% of all network net income before taxes and NBC had 39% of such income. ABC had no net income. This net income in the case of CBS represented 28% of the total net income of the entire television broadcasting industry.

In 1954 CBS-TV had affiliation with 202 stations, and in 1955 with 217 stations. By 1954 CBS-TV had become the largest network in the United States and claimed that it had become the largest single advertising medium in the world, serving 93% of the population of the United States and 94% of its total annual sales. By the end of 1955 CBS-TV and its affiliated stations were serving markets accounting for 98% of the nation's television homes.

14. The result of the monopoly of CBS, NBC and ABC in the control of local outlets for television broadcasting of national advertising throughout the United States, was, at all the times material herein, that local broadcasting television stations which had no affiliation with one of the abovementioned national networks, could not obtain the programs of nationwide popularity created and produced by the networks, and except in the three or four largest cities of the United States, these local stations could not afford themselves to create and produce such programs. They therefore were relegated to broadcasting programs of little popularity, consisting mainly of antiquated motion picture films and phonograph recordings. With these programs they could not secure an audience great enough to attract national advertisers and obtained no national advertising. The final result was that at all the times material to this action, no unaffiliated local station could com-

pete successfully with stations owned by or affiliated with one of the three national networks, or operate profitably in any Class A territory. This is especially true in the case of what are known as UHF stations, a term described more fully hereafter. There was and is no place in the United States where an unaffiliated UHF station could or can operate and survive in competition with stations owned by or having affiliation with a national network.

VII.

INCREASE OF BROADCASTING CHANNELS IN 1952.

15. All television broadcasting stations in the United States prior to June 1952 were what is known as very-high-frequency stations ("VHF"). These words refer to the wave length of the electrical impulses which are sent out by the broadcasting stations and carry the programs to the receiving sets in the hands of the public. Since each broadcast has to be sent on a definite and limited air channel or wave length in order not to interfere with the broadcast of other stations, the number of VHF stations which can be licensed in any given area is limited by the number of channels in the VHF portion of the radio spectrum, and until June 1952 licenses were limited by FCC to Channels 2 to 13.

16. In June 1952 FCC, believing that this number of channels was too few to create a comprehensive and competitive nationwide television system, opened additional channels (14 to 82) for the use of ultra-high-frequency stations ("UHF"); that is, stations broadcasting by means of shorter wave lengths than VHF stations used.

17. Few, if any, receivers in the hands of the public were equipped at that time to receive UHF signals (or broadcasts), and for that reason the success of UHF sta-

tions was extremely problematical. Their success depended on their ability to broadcast programs of such especial appeal that owners of receiving sets would be willing to spend the money necessary to convert their sets and render them receptive to UHF broadcasts. This handicap in the operation of UHF stations made their dependence on affiliation with a national network even greater than the dependence of the less handicapped VHF stations.

VIII.

SITUATION IN MILWAUKEE.

18. In 1952 and from then until the present, and now, Milwaukee is in importance in the television industry, the 13th market in the United States, and at no time material to this action could a UHF television station remain in existence at Milwaukee without the advantage of an affiliation with CBS, NBC or ABC.

19. Prior to June 1952 Midwest was the owner of and licensed to operate and did operate radio station WMAW in Milwaukee; Midwest had no license for and did not operate a television station. In June 1952, when FCC ended its freeze on new licenses, as aforesaid, there was at Milwaukee one television broadcasting station, with call latters "WTMJ". WTMJ was a VHF station and had a primary affiliation with NBC. It had secondary affiliations with CBS-TV, ABC and DuMont.

20. When FCC created additional channels for UHF in June 1952, it allocated three of these channels (19, 25 and 31) for commercial television broadcasting to Milwaukee.

21. Prior to November 18, 1952 Midwest applied to FCC for a license to establish a VHF station at Milwaukee on channel 12.

Because of the anticipated delay in securing such a license, on November 18, 1952, Midwest, which by then had changed its call letters from WMAW to WCAN, applied to FCC for leave to amend its application to relate to channel 25 UHF. On February 4, 1953 Midwest was granted a construction permit for channel 25 for Milwaukee. This made Midwest the second television station at Milwaukee. Midwest proceeded to purchase the equipment necessary for efficient operation of the station and entered into a lease with Schroeder Hotel Company for a tower on the top of the hotel. The cost of the station, paid for by Midwest, was in excess of $500,000.

22. As the time of completion of the station approached Midwest negotiated with CBS-TV for an affiliation agreement. At that time CBS-TV had only a secondary affiliation in Milwaukee. Under date of August 21, 1953 an affiliation agreement was entered into between Midwest and CBS-TV, dated August 21, 1953. The term of the agreement was two years with automatic extensions of two years indefinitely, but CBS-TV reserved the unilateral right to terminate the agreement at any time on six months' notice.

23. On September 5, 1953 Midwest began broadcasting. Almost immediately the station had great public acceptance, and in the course of six months over 60% of the 260,000 television sets in Milwaukee area were converted to UHF in order to be able to receive the programs of WCAN-TV. WCAN-TV carried almost 90% of the network schedule of CBS-TV. The acceptance by the public of WCAN-TV improved continuously. By December 1953 WCAN-TV was operating profitably. It was probably the most successful UHF station in the United States. By October 1954 almost 90% of the television sets in the Milwaukee area were converted so that they could receive UHF programs.

IX.

MATERIAL EVENTS IN MILWAUKEE IN 1953 AND EARLY 1954.

24. Meanwhile, between November 18, 1952, when WCAN-TV amended its application, and January 1954, four events, very important to this action, had occurred.

(1) June 3, 1953, Bartell Broadcasters, Inc., which previously had operated a radio station at Milwaukee, obtained from FCC a construction permit for a UHF station at Milwaukee on channel 19, with the call letters WOKY. WOKY constructed an inferior station and went on the air October 3, 1953 with secondary affiliation agreements with ABC and also with DuMont. DuMont already then was in the process of disintegrating as a national network, and did disintegrate as a national network before the end of 1954.

(2) Hearst Radio, Inc. (owned by the Milwaukee Sentinel) owned and operated a radio station in Milwaukee affiliated with CBS Radio, with the call letters WISN. WISN had no television license. On September 30, 1953 WISN applied to FCC to institute rule-making proceedings to amend the table of assignments so as to add VHF channel 6 to White Fish Bay, Wisconsin, a residential suburb of Milwaukee. Such a rule was granted by FCC and became effective January 10, 1954. WISN and two others immediately applied for channel 6, and the final granting of a license to WISN was deferred by FCC pending hearings.

(3) In 1953 four separate groups in addition to WCAN had applied for channel 12 (VHF) which FCC had allocated to Milwaukee in June 1952. On May 18, 1954 these four groups merged their applications under the name of "Milwaukee Area Broadcasting Company", and on June 11, 1954 channel 12 was granted to the merged group, which was

authorized to go on the air September 3, 1954. The group advertised on August 26, 1954 that it had a primary ABC affiliation and it went on the air October 27, 1954 with such an affiliation. After a short and unprofitable operation the station was sold to the Hearst WISN, and the transfer of channel 12 to WISN was approved by FCC March 2, 1955.

(4) On December 24, 1953 FCC began consideration of a rule to allow a single licensee to own seven television stations, of which not more than five could be VHF. Previously, the rule did not permit one ownership to have more than five stations.

The rule was adopted by FCC September 17, 1954.

X.

NEGOTIATIONS WITH GEORGE B. STORER

25. As has been said, WCAN by January 1954 was on a profitable basis with excellent prospects. It then was approached by a broker who was acting on behalf of George B. Storer, of Miami, Florida. After WCAN had given the broker financial information, the broker reported that if and when FCC adopted a multiple ownership rule which would allow Storer to add a UHF station to those owned by him already, Storer was willing to buy WCAN for $2,000,000.

XI.

PROBLEMS OF WCAN.

26. Hearst had had for WISN prior to June 1952 a basic radio affiliation with CBS which contained a clause providing that if, as and when the station secured a television license, CBS would give it a television affiliation.

When, early in 1954, FCC approved Hearst's petition to move channel 6 to White Fish Bay, and when later in 1954 the four groups who were applying for channel 12 merged their applications, WCAN was faced with an ob-

vious danger of the loss of its CBS affiliation. WCAN was considering at that time making substantial improvements to its station, which would involve large financial commitments on its part. Before proceeding with these commitments, it was necessary for WCAN to assure itself that its affiliation with CBS-TV was unlikely to be terminated by CBS-TV. It long has been and still is the custom in the television industry for affiliation contracts to be continued for term to term except where the performance by a local station has been unsatisfactory. Accordingly, WCAN informed CBS and CBS-TV and Van Volkenburg and Akerberg (hereinafter referred to as "CBS defendants") of its plans, and submitting them in detail. CBS defendants encouraged WCAN to proceed with its plans, and told WCAN that CBS and CBS-TV preferred affiliation with WCAN to affiliation with the licensees of channel 6 or channel 12, and that CBS or CBS-TV did not plan to buy any television station in Milwaukee.

27. In view of these assurances from CBS defendants, which were repeated in later months of 1954, WCAN embarked on its expansion plans. WCAN entered into contracts for more powerful broadcasting equipment, so that CBS-TV would not be at a disadvantage in the market by reason of its affiliation with WCAN, and spent substantial sums for advertising and promotion. On September 3, 1954 WCAN entered into a 15-year lease for premises at Milwaukee on which a building was to be constructed, WCAN paying for the electric, heating and air-conditioning equipment. The total rent under the lease, which was in excess of $500,000, was guaranteed individually by Lou Poller, President, and Rose Poller, Secretary, of Midwest.

XII.

CONSPIRACY OF DEFENDANTS.

28. By the middle of 1954 it was obvious that WCAN was on a profitable basis, and this fact was well known to CBS defendants.

At or about that time CBS defendants entered into a conspiracy with each other and with the other defendants herein and with others, for the purpose of forcing Midwest to sell its station to CBS or CBS-TV at whatever price CBS or CBS-TV was willing to pay, thereby eliminating Midwest from the operation of the station, in restraint of trade and commerce in the television industry, and for the purpose of further strengthening the monopoly of CBS and CBS-TV in the control of television broadcasting outlets of value for national advertising purposes in the important markets of the United States. CBS defendants well knew that there would not be available to WCAN an affiliation agreement with either NBC or ABC, these networks already having affiliations with VHF stations, which they greatly preferred to affiliation with a UHF station. They knew, therefore, that WCAN was completely dependent for existence on the continuance of its affiliation agreement with CBS-TV.

29. To the end of consummating this conspiracy, CBS defendants persuaded Storer to discontinue his negotiations for the purchase of WCAN, and to state to Midwest that he had no further interest in the acquisition of that station. Storer so stated to WCAN.

30. Further to that end, CBS defendant conspired with defendant Holt, of Birmingham, Alabama, to obtain from defendant, Bartell Broadcasters, Inc., the owner thereof, as agent for CBS and CBS-TV, his undisclosed principals, an option to buy the physical assets and license of its station, WOKY, with the understanding that when requested by the CBS defendants, Holt would assign the option to CBS or CBS-TV.

Pursuant to this conspiracy and the directions of CBS, defendant Holt, on July 29, 1954, secured an option from Bartell Broadcasters, Inc. for the sum of $1,000, to buy the physical assets and obtain the transfer of the license of WOKY. The option was good until October 1, 1954 and

could be extended by Holt to February 1, 1955 on payment of $4,000 additional.

On September 29, 1954 at the direction of CBS defendants, Holt extended his option, but stated to Bartell Broadcasters, Inc. that he did not wish to exercise his option to buy the land belonging to WOKY or its tower or transmitter building. By this time the fact that WCAN had entered into the long lease and had planned its new studio building as aforesaid, was well known to CBS defendants.

On October 25, 1954 Holt assigned the option to CBS, and on that date CBS exercised the said option, subject to approval by FCC.

31. In final execution of the conspiracy aforesaid, CBS, by telegram dated October 21, 1954, notified Midwest of the cancellation by CBS-TV of the affiliation agreement between CBS-TV and Midwest, effective April 22, 1955.

XIII.

SITUATION OF WCAN.

32. As the result of the foregoing conspiracy, the situation of WCAN at the time of the receipt of the telegram was, as planned by CBS defendants, as follows:

Storer had been removed as a possible purchaser of WCAN-TV. CBS, or CBS-TV had bought the license of WOKY and was in a position, upon cancellation of its affiliation with WCAN-TV, adequately to equip WOKY, and to transfer its programs to that station. This would leave WCAN-TV with no affiliation with CBS-TV and with no chance of affiliation with NBC or ABC, and with the responsibility on the part of Midwest for a 15-year lease and heavy commitments for construction and equipment. Without any network affiliation, WCAN could not operate its UHF station successfully, as the defendants well knew. Therefore, the successful consummation of the conspiracy aforesaid was inevitable. WCAN-TV, completely at the mercy of CBS defendants, entered into an agreement with

CBS on November 12, 1954, conditioned on the approval of FCC, to sell its station and its leases to CBS for $756,363.12, of which Midwest had to accept $256,363.12 by the delivery to it of the inferior equipment of WOKY, which CBS had agreed with WOKY to buy from WOKY. CBS assumed the leases and construction and equipment obligations of WCAN-TV. The agreement was worded to make it appear that WCAN was not being put out of business. This was in order to pretend that there was no restraint of trade or elimination of competition by reason of the purchase. The fact, however, was that without its physical assets, and with the cancellation of its affiliation agreement with CBS-TV, and with affiliations of the other networks already committed in Milwaukee, WCAN could not continue in business. The CBS defendants well understood this.

33. On November 18, 1954, in consummation of the conspiracy aforesaid, Bartell filed in Washington, D. C., in the office of the Secretary of the FCC its application for consent to assign its construction permit or license to CBS, designating an agent in the District of Columbia for notice and communications addressed to it; and CBS at the same time applied to FCC for permission to move the transmitter location of WOKY to the location of WCAN and to install a new transmitter (purchased from WCAN) for WOKY. On January 14, 1955 FCC, by a vote of three to two (two Commissioners not participating), granted the applications of WOKY and CBS. On February 17, 1955 CBS consummated the transfer of channel 19 and adopted the call letters WXIX.

34. On February 27, 1955 settlement was made between Midwest and CBS. CBS paid Midwest $1,000 a day for every day prior to April 22, 1955 that the settlement was made.

35. On February 27, 1955, CBS-TV took possession of the station of WCAN, and Midwest discontinued the operation of the station. WCAN was unable, as has been stated,

to secure an affiliation with a network, was unable with its UHF position, to compete with the two VHF stations at Milwaukee, or with WOKY now owned and operated as WXIX by CBS-TV. It never was able to resume business and has been completely out of the television business since February 27, 1955.

36. On January 27, 1955, in anticipation of the discontinuance of its business, the stockholders of Midwest adopted a plan of liquidation and dissolution, and on December 30, 1955 Midwest conveyed, transferred and assigned all of its assets to Lou Poller, the plaintiff herein, who then was its sole stockholder. Lou Poller agreed to assume and pay all obligations of Midwest. Since December 30, 1955 Lou Poller has been and now is the sole owner of all the assets of Midwest including the right of action set forth in this complaint.

XIV.

MONOPOLIZATION.

37. Defendants CBS and CBS-TV have conspired among themselves to monopolize and are monopolizing interstate trade and commerce in the television industry, inter alia, (1) by the ownership and operation of a nationwide network for the production and broadcast of television programs, and (2) by the acquisition, ownership and operation of local television broadcasting stations, including WOKY (now known as WXIX), while simultaneously owning and operating a nationwide television broadcasting network.

XV.

DAMAGES.

38. The fair value of WCAN at the time that Midwest was forced to sell its station to CBS as the result of the conspiracies and monopoly above mentioned, was at least

$2,000,000. Midwest received from CBS for said assets $500,000 in cash and equipment previously owned by WOKY, the value of which at the time of its receipt, and now, did not and does not exceed $50,000. The said equipment is in storage and the plaintiff is able, ready and willing to turn it back to CBS.

39. As the result of the acts of defendants aforesaid, plaintiff has suffered damages in the sum of $1,500,000 less the value of the equipment mentioned in the preceding paragraph hereof.

WHEREFORE, plaintiff demands that damages be awarded to plaintiff and against defendants in the sum of $1,450,000, to be trebled in accordance with the statute in such case made and provided, together with interest, counsel fee and costs.

/s/ GEORGE R. BENEMAN
George R. Beneman,
1632 K Street, N. W.,
Washington 6, D. C.,
Attorney for Plaintiff.

WOLF, BLOCK, SCHORR AND SOLIS-COHEN,
12th Floor Packard Building,
Philadelphia 2, Pennsylvania,
Of Counsel.

DEMAND FOR TRIAL BY JURY.

Plaintiff demands trial of the above entitled cause to a jury.

/s/ GEORGE R. BENEMAN
George R. Beneman,
1632 K Street, N. W.,
Washington 6, D. C.,
Attorney for Plaintiff.

ANSWER OF DEFENDANTS COLUMBIA BROADCASTING SYSTEM, INC. ("CBS"), J. L. VAN VOLKENBURG AND H. K. AKERBERG DEMANDING JUDGMENT DISMISSING COMPLAINT.

Filed October 2, 1956.

First Defense.

The complaint fails to state a claim upon which relief can be granted.

Second Defense.

1. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 1 of the complaint, except that they admit that prior to February 25, 1955 Midwest operated a television broadcasting station, WCAN-TV, in the City of Milwaukee.

2. Defendants admit the allegations in paragraph 2 of the complaint, except that they deny that CBS Television is a subsidiary of CBS and allege that CBS Television is a division of CBS and is not a legal entity capable of being sued; and defendants allege that the CBS television network is incompletely and inadequately described in this paragraph of the complaint.

3. Defendants deny the allegations in paragraph 3 of the complaint, except that they admit that an officer and certain employees of CBS are designated as officers and employees of CBS Television.

4. Defendants admit the allegations in paragraph 4 of the complaint, except that they deny the allegation that J. L. Van Volkenburg is and was the president of CBS-TV and allege that he is and was an officer of CBS designated as president of CBS Television.

5. Defendants admit the allegations in paragraph 5 of the complaint, except that they deny the allegation that H. K. Akerberg is and was a vice-president of CBS-TV and

allege that he is and was an employee of CBS designated as a vice-president of CBS Television.

6. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 6 of the complaint, except that they admit that prior to January 14, 1955 Bartell Broadcasters, Inc. was the licensee of television station WOKY-TV, and that on or about that date CBS purchased that station from Bartell Broadcasters, Inc., and since that date has owned and operated that station under the call letters WXIX; and except that defendants deny that such transfer took place in the circumstances set forth in the complaint.

7. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 7 of the complaint.

8. Defendants deny the allegations in paragraph 8 of the complaint.

9. Defendants deny the allegations in paragraph 9 of the complaint and in each of the subparagraphs thereof.

10. Defendants deny the allegations in paragraph 10 of the complaint, except that they admit that the television industry and certain of the activities therein of the parties hereto constitute interstate commerce; and except that they admit that the activities on the part of CBS have included and include the creation and production of programs in various states of the United States and in the District of Columbia, which consist in part of actual events occurring therein, and that the programs produced and offered by CBS are transmitted by means of telephone cables and microwave relay systems to television broadcast stations throughout the United States (including the stations owned and operated by CBS), and that the programs offered by CBS are broadcast by television stations in the various states and the District of Columbia to listeners in some cases located outside the state in which the broadcast station is located.

11. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 11 of the complaint.

12. Defendants deny the allegations in paragraph 12 of the complaint, except that they admit that in the television industry the term "affiliation" is used to mean the relationship established by certain contracts between networks and broadcasting stations, and allege that the nature of such relationship is determined in each case by the contract between the parties; and defendants admit that in the television industry the term "network" is used to mean an organization which causes programs to be furnished to stations with which it has affiliation agreements and which is able to offer its clients the broadcasting of their advertisements in many localities; and defendants allege that this paragraph of the complaint contains over-general, misleading and argumentative allegations which require no further specific answer.

13. Defendants deny the allegations in paragraph 13 of the complaint, except that they are without knowledge or information sufficient to form a belief as to the truth of the allegations in the fourth and fifth subparagraphs thereof, and except that they admit the allegations in the last subparagraph thereof; and defendants allege that the various subparagraphs of this paragraph contain over-general, misleading and argumentative allegations which require no further specific answer.

14. Defendants deny the allegations in paragraph 14 of the complaint.

15. Defendants admit the allegations in paragraph 15 of the complaint.

16. Defendants admit the allegations in paragraph 16 of the complaint.

17. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations

in paragraph 17 of the complaint, except that they admit that at the time therein referred to few receivers in the hands of the public were equipped to receive UHF signals.

18. Defendants deny the allegations in paragraph 18 of the complaint.

19. Defendants admit the allegations in paragraph 19 of the complaint, except that they are without knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence thereof.

20. Defendants admit the allegations in paragraph 20 of the complaint.

21. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 21 of the complaint.

22. Defendants admit the allegations in paragraph 22 of the complaint, except that they allege that the automatic extension of the agreement at the expiration of any two-year term could be avoided by notice given by either party to the other.

23. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 23 of the complaint, except that they admit the allegation in the first sentence thereof, and except that they admit that WCAN-TV carried substantial proportions of the network schedule of CBS Television, which proportions varied from time to time.

24. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 24 of the complaint, except that they admit the allegations of subparagraph (2) thereof and except that they admit that prior to September 17, 1954 the rules of the FCC permitted a single owner to have no more than five television stations and that on that date the FCC adopted a rule permitting a single licensee to own seven

television stations, of which not more than five could be VHF.

25. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 25 of the complaint.

26. Defendants deny the allegations in paragraph 26 of the complaint.

27. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 27 of the complaint, except that they deny that WCAN-TV embarked on expansion plans or incurred any expenditures in view of, or in reliance on, any assurances from any of the CBS defendants, and except that defendants deny that WCAN-TV entered into any contracts or spent any sums in order to protect CBS from being at a disadvantage in the market.

28. Defendants deny the allegations in paragraph 28 of the complaint.

29. Defendants deny the allegations in paragraph 29 of the complaint.

30. Defendants deny the allegations in paragraph 30 of the complaint, except that they admit that on July 29, 1954 defendant Holt secured an option from Bartell Broadcasters, Inc. for the sum of $1,000 to buy the physical assets and obtain the transfer of the license of WOKY, and that he did so with the understanding that Holt would assign the option to CBS upon its request; and they admit that the option was good until October 1, 1954 and could be extended by Holt to February 1, 1955 on payment of $4,000 additional, and that on September 29, 1954, at the request of CBS, Holt extended his option, and that on October 25, 1954 Holt assigned the option to CBS, and on that date CBS exercised the option, subject to approval by the FCC; and except that defendants are without knowledge or

information as to any statement made by Holt to Bartell Broadcasters, Inc.

31. Defendants deny the allegations in paragraph 31 of the complaint, except that they admit that by telegram dated October 21, 1954 CBS notified Midwest of the cancellation of the affiliation agreement between CBS and Midwest effective April 22, 1955.

32. Defendants deny the allegations in paragraph 32 of the complaint. Defendants allege that on November 12, 1954, CBS entered into an agreement with Midwest, subject to the approval of the FCC, by which Midwest agreed to sell to CBS some of its broadcasting equipment and apparatus and to assign to CBS its lease on its broadcasting studio building and certain contracts connected therewith and its lease on a broadcasting transmitting site for a price of $756,363.12. In that contract Midwest represented that it intended to continue the operation of station WCAN, and that it desired to acquire the broadcasting equipment of station WOKY, and Midwest agreed to purchase and CBS agreed to sell certain broadcasting equipment and apparatus which had been used by Bartell Broadcasters, Inc. for a price of $256,363.12.

33. Defendants admit the allegations in paragraph 33 of the complaint, except that they deny the allegation that the acts therein described were in consummation of the alleged conspiracy.

34. Defendants admit the allegations in paragraph 34 of the complaint.

35. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 35 of the complaint, except that they admit the allegations in the first sentence thereof.

36. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 36 of the complaint.

37. Defendants deny the allegations in paragraph 37 of the complaint.

38. Defendants deny the allegations in paragraph 38 of the complaint, except that they admit that Midwest received from CBS for the assets transferred to it the sum of $500,000 in cash and certain equipment previously owned by WOKY; and except that defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in the last sentence of said paragraph.

39. Defendants deny the allegations in paragraph 39 of the complaint.

WHEREFORE, defendants demand judgment dismissing the complaint and awarding to them their costs and disbursements herein.

/s/ LEON R. BROOKS,
Leon R. Brooks,
1735 DeSales Street, N. W.,
Washington, D. C.,
Attorney for Defendants Columbia Broadcasting System, Inc., J. L. Van Volkenburg and H. K. Akerberg.

Of Counsel:

ROSENMAN GOLDMARK COLIN & KAYE,
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New York 22, N. Y.

EXCERPTS FROM ANSWERS OF DEFENDANTS COLUMBIA BROADCASTING SYSTEM, INC. (CBS), J. L. VAN VOLKENBURG, AND H. V. AKERBERG TO INTERROGATORIES ADDRESSED TO THEM ON BEHALF OF PLAINTIFF.

(Filed January 23, 1957)

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2. State when a decision was first made to acquire a television broadcasting station in Milwaukee or the Milwaukee area, and the names of all persons who in any way participated in the making of that decision.

(a) What were the factors or criteria which were taken into consideration in reaching the final decision?

The decision was made in July 1954 that CBS should be in a position to acquire a television broadcasting station in Milwaukee or the Milwaukee area in the event that the Federal Communications Commission were to amend its multiple ownership rule to permit a single owner to own five VHF stations and two UHF stations. The decision to acquire such a station was definitely made on or about October 18, 1954, just before the effective date of the amendment to the Commission's rule. Persons who participated in the decision were Frank Stanton, J. L. Van Volkenburg, H. V. Akerberg, William B. Lodge, Richard S. Salant, Merle S. Jones, Daniel O'Shea, Howard Meighan, and Julius F. Brauner, and possibly some others.

(a) Factors which were taken into consideration in reaching the final decision were the desire of CBS to furnish its programs most effectively to the viewing public of the Milwaukee area, to facilitate the expansion and development of its nationwide television network service, to participate in the development of, and accelerate the growth of, UHF service, to foster competition among the networks, and to provide additional revenues with which further to

develop and advance television. Criteria that were considered included the size of the market and its anticipated growth, the purchasing power of its population, the extent of conversion to UHF, and the estimated revenues to be derived from the station.

3. Identify all television stations in Milwaukee or the Milwaukee area which you considered acquiring, and state all the factors which prompted you to purchase WOKY, and not to purchase any of said other stations. If no consideration was given to the purchase of WCAN, state why.

WTMJ-TV and WOKY-TV. It was ascertained that the owner of WTMJ-TV was not interested in selling it. When it appeared likely that the Federal Communications Commission would modify the multiple ownership rule, it was decided that Milwaukee was an appropriate market in which to acquire a UHF station, and that WOKY-TV was the only UHF station for which CBS could negotiate. Consideration was not given to the purchase of WCAN-TV because (1) it was known that Midwest Broadcasting Company had placed an unreasonably high price on the station and it was believed that, by acting through an agent who would not disclose that CBS was the prospective purchaser, WOKY-TV could be purchased at a reasonable price; and (2) it was considered inadvisable, under the circumstances, for CBS to enter into bargaining negotiations with one of its own affiliates.

4. Identify by date, author or sender, addressee (if any), and title (if any) all memoranda, correspondence, minutes, surveys, studies, reports, or publications which were prepared, drafted, sent, received, or utilized by you in connection with your decision to acquire a television broadcasting station in Milwaukee or the Milwaukee area, and the implementation of that decision.

(a) State the name and address of the person who now has custody or control thereof.

As defendants' study of television markets has been a continuing process over several years, it is not possible to enumerate all the documents that may have had a bearing on the decision.

Among the significant published studies and reports that were considered from time to time and that may have influenced the decision were the United States Census Bureau's data on Metropolitan County Areas (1950 Census) and State Growth Forecasts (Jan. 27, 1952); the Survey of Buying Power published annually by Sales Management; the listings of estimated television homes in United States markets in Broadcasting-Telecasting Magazine; and the Nielsen, Hoper and Telepulse audience data.

Relevant memoranda and reports in the files of defendant CBS are:

May 27, 1953—Sidney S. Alexander to Dr. Stanton and others, Estimated Future Revenue of a Leading Television Station in Each Leading Market at 95% Saturation.

November 3, 1953—Sidney S. Alexander to Frank Stanton, Possible Revisions in May 1953 Estimates of Future Revenues of Television Stations.

November 19, 1953—Mr. Lodge to Dr. Stanton, Subject: Rank of U. S. Markets.

December 21, 1953—Mr. Lodge to Dr. Stanton, Subject: UHF Ownership.

December 28, 1953—Mr. Lodge to Mr. Van Volkenburg.

January 20, 1954—Sidney Alexander, Relative Attractiveness of a UHF Station in Various Leading Markets.

October 1954—CBS Television Spot Sales Research Department, The Milwaukee Television Market.

The decision was implemented by the following documents:

Option Agreement dated July 29, 1954 between Bartell Broadcasters, Inc. and Thad Holt.

Letter agreement dated September 27, 1954 between CBS and Thad Holt.

Letter dated September 29, 1954 from Thad Holt to Bartell Broadcasters, Inc.

Agreement dated October 25, 1954 between CBS and Thad Holt.

Letter dated October 25, 1954 from CBS to Bartell Broadcasters, Inc.

FCC Form 314, Application for Consent to Assignment of Radio Broadcast Station Construction Permit or License executed October 29, 1954 by Bartell Broadcasters, Inc. and November 16, 1954 by CBS.

FCC Form 726, Consent to Voluntary Assignment of Radio Station Construction Permit, dated January 14, 1955.

Assignment of FCC Authorizations and Bill of Sale, both dated February 16, 1955 and delivered by Bartell Broadcasters, Inc. to CBS (and related closing documents).

(a) The originals or copies of the documents enumerated in the two preceding paragraphs are in the custody of defendants' attorneys.

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8. List every other television affiliate during the years 1953 and 1954, and indicate those whose affiliation agreement was similarly modified, giving the reason for such modification.

CBS had affiliation agreements during all or part of the years 1953 and 1954 with the stations listed below; each station which had an agreement subject to termination on notice of less than one year, and the period of such notice, is shown by the notice period set forth after the name of that station. The reason for inclusion of such a termination provision was that it was considered desirable by CBS, by the affiliate, or by both parties, to maintain flexibility due to considerations which varied from one market to another. In general, the considerations which influenced CBS to insert such a provision included the desire to maintain freedom to affiliate with other stations that were either on the air or expected to go on the air; uncertainty as to the performance of the affiliate; the varying willingness of the affiliates to carry CBS programs; and the desire to be in a position to improve the competitive position of CBS Television in the market.

Station	*Termination Provision*
WTRI-TV, Albany, N.Y.	3 months
KGGM-TV, Albuquerque, N.M.	
KOB-TV, Albuquerque, N.M.	6 months
KFDA-TV, Amarillo, Tex.	
WOI-TV, Ames, Iowa	6 months
KFIA, Anchorage, Alaska	6 months
WISE-TV, Asheville, N.C.	6 months
WFPG-TV, Atlantic City, N.J.	6 months
WAGA-TV, Atlanta, Ga.	
WRDW-TV, Augusta, Ga.	
KMMT-TV, Austin, Minn.	6 months
KTBC-TV, Austin, Tex.	
KERO-TV, Bakersfield, Cal.	6 months
WMAR-TV, Baltimore, Md.	
WABI-TV, Bangor, Me.	
WTWO-TV, Bangor, Me.	3 months
WAFB-TV, Baton Rouge, La.	6 months

Station	*Termination Provision*
KFDM-TV, Beaumont, Tex.	
KVOS-TV, Bellingham, Wash.	6 months
KBST-TV, Big Spring, Tex.	6 months
KOOK-TV, Billings, Mont.	
WNDF-TV, Binghamton, N.Y.	
WABT, Birmingham, Ala.	6 months
WBRC-TV, Birmingham, Ala.	
KFYR-TV, Bismarck, N.D.	
WTTV, Bloomington, Ind.	6 months
KIDO-TV, Boise, Ida.	13 weeks
WNAC-TV, Boston, Mass.	
WBEN-TV, Buffalo, N.Y.	
WMVT, Burlington, Vt.	
KOPR-TV, Butte, Mont.	
WWTV, Cadillac, Mich.	
KFVS-TV, Cape Girardeau, Mo.	6 months
WMT-TV, Cedar Rapids, Iowa	
WCIA-TV, Champaign, Ill.	
WCHS-TV, Charleston, S.C.	
WCSC-TV, Charleston, S.C.	
WBTV-TV, Charlotte, N.C.	6 months
WDEF-TV, Chattanooga, Tenn.	3 months
KFBC-TV, Cheyenne, Wyo.	
KHSL-TV, Chico, Cal.	
WEWS-TV, Cleveland, Ohio	90 days
KKTV-TV, Colorado Springs, Colo.	6 months
WDAK-TV, Columbia, Ga.	6 months
KOMU-TV, Columbia, Mo.	6 months
WNOK-TV, Columbia, S.C.	
WDAK-TV, Columbus, Ga.	6 months
WRBL-TV, Columbus, Ga.	
WBNS-TV, Columbus, Ohio	
KRLD-TV, Dallas, Tex.	
WHIO-TV, Dayton, Ohio	

Station	*Termination Provision*
WMSL-TV, Decatur, Ala.	6 months
WTVP-TV, Decatur, Ill.	90 days
KLZ-TV, Denver, Colorado	
WJBK-TV, Detroit, Mich.	
WDSM-TV, Duluth, Minn.	
KROD-TV, El Paso, Tex.	
WSEE-TV, Erie, Pa.	6 months
KIEM-TV, Eureka, Cal.	
KFIF, Fairbanks, Alaska	6 months
WDAY-TV, Fargo, N.D.	6 months
WBTW-TV, Florence, S.C.	
WINK-TV, Ft. Myers, Tex.	6 months
WINT-TV, Ft. Wayne, Ind.	90 days
KMJ-TV, Fresno, Cal.	6 months
KGUL-TV, Galveston, Tex.	
KREX-TV (KFXJ-TV), Grand Junction, Colorado	6 months
WOOD-TV, Grand Rapids, Mich.	6 months
KFBB-TV, Great Falls, Mont.	
WBAY-TV, Green Bay, Wisconsin	
WFMY-TV, Greensboro, N.C.	
WNCT-TV, Greenville, N.C.	
KHQA-TV, Hannibal, Mo.	
KGBT-TV, Harlingen, Tex.	
WHP-TV, Harrisburg, Pa.	
CMTV, Havana, Cuba	
KGMB-TV, Honolulu, Hawaii	
KPRC-TV, Houston, Tex.	6 months
WSAZ-TV, Huntington, W. Va.	6 months
KID-TV, Idaho Falls, Ida.	
WFBM-TV, Indianapolis, Ind.	
WISH-TV, Indianapolis, Ind.	
WHCU-TV, Ithaca, N.Y.	6 months
WJTV, Jackson, Miss.	9 months

Station	*Termination Provision*
WDXI-TV, Jackson, Tenn.	6 months
WMBR-TV, Jacksonville, Fla.	
WTHL-TV, Johnson City, Tenn.	
KSWM-TV, Joplin, Mo.	
KMBC and WHB-TV, Kansas City, Mo.	6 months
KHOL-TV, Kearney, Neb.	
WKNY-TV, Kingston, N.Y.	6 months
WTSK, Knoxville, Tenn.	6 months
WKBT, LaCross, Wisconsin	6 months
WFAM-TV, Lafayette, Ind.	6 months
KTAG-TV, Lake Charles, La.	
WGAL-TV, Lansing, Mich.	6 months
KLAS-TV, Las Vegas, Nev.	
WIMA-TV, Lima, Ohio	6 months
KATV-TV, Little Rock, Ark.	
WHAS-TV, Louisville, Ky.	
KDUB-TV, Lubbock, Tex.	
WLVA-TV, Lynchburg, Va.	
WMAZ-TV, Macon, Ga.	
WKOW-TV, Madison Wisconsin	6 months
KGLO-TV, Mason City, Iowa	
KBES-TV, Medford, Ore.	
WHBQ-TV, Memphis, Tenn.	
WTOK-TV, Meridian, Miss.	6 months
XHTV, Mexico City, Mexico	6 months
WTVJ, Miami, Fla.	6 months
WCAN-TV, Milwaukee, Wisconsin	6 months
WTMJ-TV, Milwaukee, Wisconsin	60 days
WCCO-TV, Minneapolis, Minn.	
KCJB-TV, Minot, N.D.	6 months
KGVO-TV, Missoula, Mont.	6 months
KNOE-TV, Monroe, La.	6 months

Station	*Termination Provision*
KMBV-TV, Monterey, Cal.	6 months
KCOV-TV, Montgomery, Ala.	
WLCB-TV, Muncie, Ind.	
WLAC-TV, Nashville, Tenn.	
WSIX-TV, Nashville, Tenn.	9 months
WNHC-TV, New Haven, Conn.	6 months
WDSU-TV, New Orleans, La.	6 months
WTAR-TV, Norfolk, Va.	6 months
KWTV, Oklahoma City, Okla.	
WKY-TV, Oklahoma City, Okla.	
KMTV-TV, Omaha, Neb.	
WDBO-TV, Orlando, Fla.	
WPFA-TV, Pensacola, Fla.	6 months
WEEK-TV, Peoria, Ill.	6 months
WTVH-TV, Peoria, Ill.	6 months
WCAU-TV, Philadelphia, Pa.	
KPHD-TV, Phoenix, Ariz.	
KRTV-TV, Pine Bluff, Ark.	
KOAM-TV, Pittsburgh, Kan.	6 months
KIST-TV, Pocatello, Ida.	
WMTW-TV, Poland, Me.	
WGAN-TV, Portland, Me.	
WPMT-TV, Portland, Me.	6 months
KPTV, Portland, Ore.	6 months
KOIN-TV, Portland, Ore.	
WJAR-TV, Providence, R.I.	
WNET-TV, Providence, R.I.	3 months
WPRO-TV, Providence, R.I.	
WHUM-TV, Reading, Pa.	
KZTV, Reno, Nev.	6 months
WHEC-TV (WVET-TV), Rochester, N.Y.	6 months
WTVO-TV, Rockford, Ill.	6 months
WREX-TV, Rockford, Ill.	

Station	*Termination Provision*
WHBF-TV, Rock Island, Ill.	
WKNX-TV, Saginaw, Mich.	6 months
KFEQ-TV, St. Joseph, Mo.	
KWK-TV, St. Louis, Mo.	
KSBW-TV, Salinas, Cal.	6 months
WBOC-TV, Salisbury, Md.	6 months
KSL-TV, Salt Lake City, Utah	
KTXL-TV, San Angelo, Tex.	
KENS-TV, San Antonio, Tex.	
KFMB-TV, San Diego, Cal.	
KPIX-TV, San Francisco, Cal.	
WKAQ-TV, San Juan, Puerto Rico	
KVEC-TV, San Louis Obispo, Cal.	6 months
KEYT-TV, Santa Barbara, Cal.	6 months
WTOC-TV, Savannah, Ga.	
WGBI-TV, Scranton, Pa.	
KSLA-TV, Shreveport, La.	30 days
KVTV-TV, Sioux City, Iowa	
WSBT-TV, South Bend, Ind.	
KXLY-TV, Spokane, Wash.	
WHYN-TV, Springfield, Mass.	
KTTS-TV, Springfield, Mo.	
WSTV-TV, Steubensville, Ohio	
WHEN-TV, Syracuse, N.Y.	
WTHI-TV, Terre Haute, Ind.	6 months
KCMC-TV, Texarkana, Ark.-Tex.	
WSPD-TV, Toledo, Ohio	
WIBW-TV, Topeka, Kan.	
KOPO-TV, Tucson, Ariz.	
KLIX-TV, Twin Falls, Ida.	6 months
WKTY, Utica, N.Y.	6 months
KXJB-TV, Valley City, N.D.	6 months
WTOP-TV, Washington, D.C.	
WWNY-TV, Watertown, N.Y.	

Station	*Termination Provision*
WSAU-TV, Wausau, Wisconsin	6 months
WTRF-TV, Wheeling, W. Va.	6 months
KTVH-TV, Wichita, Kan.	
KSYD-TV (KWFT-TV), Wichita Falls, Tex.	
KIMH-TV, Yakima, Wash.	6 months
WKBN-TV, Youngstown, Ohio	

9. State all your reasons for cancelling Midwest Broadcasting Company's affiliation agreement on October 21, 1954.

The agreement was cancelled for the sole reason that CBS was to acquire another station in the market.

10. Name all the persons who considered the cancellation or participated in the decision to cancel the aforesaid affiliation agreement, and state when the decision was made.

The decision to cancel the affiliation agreement was a necessary consequence of the decision to purchase the license and facilities of station WOKY and was made on or about October 18, 1954, when it was decided to exercise the option on that station. So far as now recalled and as the records indicate, the persons who participated in the decision were Frank Stanton, J. L. Van Volkenburg, H. V. Akerberg, Daniel O'Shea, William B. Lodge, Merle Jones, Howard Heighan and Julius Brauner.

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13. At the time that you first made an agreement with Mr. Thad Holt for his acquisition of an option on WOKY, was it your plan, in the event that such option was exercised, to operate under the WOKY license solely with the equipment and facilities of WOKY? If so, state what reports, surveys or other documents you had of WOKY's equipment

and facilities. If not, state what plans you had, if any, for acquiring additional or alternative equipment, facilities or sites and identify by date, writer and recipient all memoranda, surveys, plans or other documents which reveal the nature of such plans.

(a) State the name and address of the person who now has custody or control thereof.

In the event that the option was exercised, it was not intended to operate under the WOKY license solely with the equipment and facilities of WOKY. It was planned to utilize those facilities and to acquire such additional facilities as CBS would find to be required. CBS had no specific plans for acquiring additional or alternative equipment, facilities or sites, as a detailed study of the WOKY equipment had not been made. The intention to increase power is reflected in a memorandum dated October 22, 1954 from Mr. Lodge to Mr. Scovill, and a memorandum dated October 26, 1954 from Mr. Schurick to Mr. Van Volkenburg, and an undated memorandum titled "Questions and Answers—Milwaukee."

(a) Copies of those memoranda are in the custody of defendants' attorneys.

14. If during the period between the time referred to in the preceding interrogatory and November 12, 1954, there were any changes in your plans with respect to the acquisition of additional or different equipment, facilities or sites for the utilization of the license of WOKY, describe each such change of plan, giving the approximate date thereof, the individuals who in any way participated in or made the decision, the reasons for the change, and the date, writer and recipient of each memorandum, survey, plan or other document reflecting the nature of and/or reasons for said change.

(a) State the name and address of the person who now has custody or control thereof.

The plans were changed between October 22 and October 29, 1954 as a result of the discussions with Mr. Poller that led to the agreement with Midwest Broadcasting Company dated November 12, 1954. The change consisted of the decision not to utilize the equipment of station WOKY-TV with such improvements thereto as would be found necessary, but to utilize instead the equipment that was to be purchased from Midwest Broadcasting Company and the studio and transmitter sites that were under lease to Midwest Broadcasting Company, which leases were to be assigned to CBS. The reason for the change was that Mr. Poller complained that if he had known that his affiliation agreement was to be terminated he would not have required all the equipment which he had purchased and the new studio for which he had contracted. It was found that the loss of which Mr. Poller complained could be prevented and that time and some expense might be saved by taking over the equipment and studio of WCAN-TV. The individuals who participated in the decision included Frank Stanton, Richard S. Salant, J. L. Van Volkenburg, H. V. Akerberg, William B. Lodge, A. B. Chamberlain, Milton Maier, and possibly others whose identity is not now recalled. Memoranda relating to the change are:

October 27, 1954—Milton L. Maier to Merle Jones.
October 28, 1954—Mr. Chamberlain to Mr. Van Volkenburg.
November 1, 1954—Mr. Salant to Dr. Stanton.

(a) Copies of the aforementioned memoranda are in the custody of defendants' attorneys.

15. Name every officer or employee of CBS who during the years 1953 and 1954 was an officer of CBS Television, setting forth each office or position which he held during that period with CBS and with CBS Television, together with his period of tenure of each such office or position.

The following persons were officers of CBS Television during the years 1953 and 1954. None of such persons was an officer of CBS, except J. L. Van Volkenburg who was a Vice President of CBS:

Name of Person	*CBS Television Office Held*	*Tenure*
J. L. Van Volkenburg	President	7/6/31 to 12/13/56 (see letter from Doskow of 1/9/57
Harry S. Ackerman	Vice President in Charge of Network Programs—Hollywood	8/8/51 to 6/1/55
H. V. Akerberg	Vice President in Charge of Station Relations	8/8/51 to date
H. Leslie Atlass	Vice President in Charge of Central Division	8/8/51 to date
Frank Falknor	Vice President in Charge of Operations	8/8/51 to 5/7/56
Charles Glett	Vice President in Charge of Network Services—Hollywood*	8/23/51 to 7/11/55
W. S. Harrison	Vice President in Charge of Legal and Business Affairs	8/11/52 to date
William H. Hylan	Vice President in Charge of Network Sales	12/9/52 to date
Merle S. Jones	Vice President in Charge of Stations and General Services	8/8/51 to 3/19/56
William B. Lodge	Vice President in Charge of Engineering	8/8/51 to date
Hubbell Robinson, Jr.	Vice President in Charge of Network Programs	8/8/51 to 3/19/56
Edward L. Saxe	Vice President and Assistant to the President	1/4/54 to 5/7/56; prior to 1/4/54, Mr. Saxe was Controller of CBS.
William J. Flynn	Comptroller	12/1/52 to date

* During Mr. Glett's tenure, his title was changed to Vice President in Charge of Operations, Hollywood.

16. List by date and parties every agreement to which CBS Television is a party and to which CBS or any of its subsidiaries or divisions (other than CBS Television) is also a party.

Date	*Parties*	*Subject Matter*
1/ 1/56	April Music, Inc. and CBS Television.	Assignment from CTD to April of compositions of Eugene Cines.
1/ 1/56	CBS Television Film Sales, Inc. and CBS Television.	Film license agreement for WXIX (THE WHISTLER).
3/ 4/56	CBS Television Film Sales, Inc. and CBS Television.	Film license for KNXT (LIFE WITH FATHER).
5/23/56	CBS Television Film Sales, Inc. and CBS Television.	Film license agreement for KNXT (BRAVE EAGLE).
8/14/56	CBS Hytron and CBS Television.	Facilities agreement for sponsorship by Hytron of segment of GARRY MOORE SHOW (executed by Bennett & Northrop, Inc. on behalf of Hytron).
10/15/56	CBS Television Film Sales, Inc. and CBS Television.	Film license for WCBS-TV (AMOS 'N' ANDY).
11/15/56	CBS Television Film Sales, Inc. and CBS Television.	Film license agreement for KNXT (AMOS 'N' ANDY).

It is possible that there are a few other agreements similar in character to the foregoing.

17. By whom, and by what authority, are officers of CBS Television selected or designated?

The President of CBS Television Division is appointed by the Chairman of the Board or the President of CBS. The other officers of CBS Television Division are appointed by the President of CBS Television, subject to the approval of the Chairman of the Board or the President of CBS. The authority for such appointments is vested in the appointing officers by action of the Board of Directors.

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MOTION BY DEFENDANTS COLUMBIA BROADCASTING SYSTEM, INC., J. L. VAN VOLKENBURG, AND H. V. AKERBERG FOR SUMMARY JUDGMENT.

Filed September 17, 1957.

Defendants Columbia Broadcasting System, Inc., J. L. Van Volkenburg and H. V. Akerberg move the Court for Summary judgment dismissing the complaint herein.

This motion is based upon:

(1) The pleadings herein.

(2) The interrogatories served on behalf of plaintiff and defendants' answer thereto.

(3) The deposition of plaintiff.

(4) The annexed affidavits of Richard S. Salant, Jay Eliasberg, Lee Bartell and Thad Holt.

(5) The statement of points and authorities filed herewith.

Dated: September 17, 1957.

LEON R. BROOKS,
1735 DeSales Street, N. W.,
Washington, D. C.,
Attorney for Defendants Columbia Broadcasting System, Inc., J. L. Van Volkenburg and H. V. Akerberg.

ROSENMAN GOLDMARK COLIN & KAYE,
575 Madison Avenue,
New York 22, N. Y.,
Of Counsel.

AFFIDAVIT OF RICHARD S. SALANT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT.

Filed September 17, 1957.

STATE OF NEW YORK
COUNTY OF NEW YORK } *ss.:*

RICHARD S. SALANT, being duly sworn, deposes and says:

I am a Vice-President of Columbia Broadcasting System, Inc. ("CBS"), a defendant in this action. I make this affidavit in support of a motion for summary judgment dismissing the action on behalf of defendants CBS, J. L. Van Volkenburg and H. V. Akerberg.

This is a civil action for damages under the antitrust laws arising out of the purchase by defendant CBS of station WOKY-TV, a UHF television station in Milwaukee, and the consequent termination by CBS of its affiliation agreement with plaintiff's assignor, Midwest Broadcasting Company, Inc. ("Midwest"), the operator of another UHF station in Milwaukee, WCAN-TV.

During the years 1953 and 1954, when the acts complained of by the plaintiff took place, defendant J. L. Van Volkenburg was President and defendant H. V. Akerberg, a Vice-President of the Television Division of defendant CBS ("CBS Television"). I am informed that defendants CBS, Van Volkenburg and Akerberg are the only defendants who have appeared in the action; that no appearance has been entered for CBS Television because it is not a separate legal entity and is incapable of being sued; and that the other named defendants, Bartell Broadcasters, Inc. and Thad Holt, have not been served.

The complaint purports to charge defendants with a conspiracy to restrain interstate commerce in the television industry in violation of Section 1 of the Sherman Act, and

with monopolizing and conspiring to monopolize such commerce in violation of Section 2 of that Act. In the accompanying statement of points and authorities, it is shown that there is no issue of fact to be tried under either of these sections of the Act. In this affidavit, I shall set forth certain of the facts showing that:

1. There was no conspiracy to restrain trade because (a) CBS Television is not a separate legal entity capable of being a "conspirator"; and (b) in any event, CBS exercised the normal right of a producer to select the outlet for its product when it terminated its affiliation agreement with plaintiff's assignor in order to broadcast its programs over its own station.

2. Plaintiff's charge of monopolization and conspiracy to monopolize is frivolous.

1.

THE CHARGE UNDER SECTION 1 OF THE SHERMAN ACT.

(a) *CBS Television is not a separate legal entity:*

CBS Television is named in the complaint (and designated therein as "CBS-TV") as a defendant and co-conspirator, and described as "an unincorporated, wholly owned subsidiary of CBS". It is in fact one of six unincorporated operating divisions of the corporation. Through that division, CBS operates its owned television stations and the CBS television network, which furnishes programs to those owned stations and to the many independent stations which are affiliated with it by contract. Prior to the events on which this action is based, CBS owned three television stations; they were VHF stations in New York, Chicago and Los Angeles. At present, it owns those stations and UHF stations in Milwaukee and Hartford. At the time when it terminated its affiliation agreement with Midwest, CBS had affiliation agreements with about 150 independently owned stations throughout the country under

which it furnished programs to be broadcast over the facilities of those stations.

The acts of CBS Television and the acts of the other operating divisions of the company are the acts of the corporation itself, for which it assumes full legal responsiiblity. J. L. Van Volkenburg, who was President of CBS Television at all times material hereto, was a director and Vice-President of CBS. He reported to the President and Chairman of the Board of CBS, by whom he was appointed, and to the Board of Directors of the company. The other officers of CBS Television were appointed to their offices by the president of that division, subject to the approval of the Chairman of the Board or the President of CBS. The officers of CBS Television are subject at all times to the supervision and control of the Board of Directors of CBS. CBS Television itself has no board of directors or other separate managing body. It files no separate tax returns and its revenues are revenues of the corporation.

(b) *The acts complained of constituted a wholly lawful change in business arrangements and imposed no restraint on commerce.*

Plaintiff's assignor, Midwest, was the licensee of television station WCAN-TV, a UHF station operating on Channel 25 in Milwaukee. On August 21, 1953, shortly before that station commenced broadcasting, Midwest entered into an affiliation agreement with CBS. A copy of that agreement is annexed hereto, marked Exhibit A, and hereby made a part of this affidavit. It will be seen that paragraph 15 of that agreement included an express provision, which was a modification of the printed form, giving CBS the right to terminate the agreement at any time on six months' notice.

When CBS entered into the affiliation agreement with Midwest, the Multiple Ownership Rule of the Federal Communications Commission ("FCC") provided that a single

owner could not have an interest in more than five television stations. On December 24, 1953 the FCC issued a Notice of Proposed Rule Making, looking toward the amendment of that rule to permit single ownership of seven stations, of which no more than five could be VHF stations. CBS filed with the FCC a statement in support of the proposed amendment and publicly announced its intention to acquire two UHF stations if the amendment should be adopted.

The proposed amendment was adopted by a Report and Order dated September 17, 1954, in Docket No. 10822 (11 R. R. 1519).

In anticipation of the amendment to the Multiple Ownership Rule, CBS made plans to enable it to acquire a UHF station in Milwaukee. For this purpose, it engaged the services of the defendant Thad Holt to act as its agent in negotiating for an option to purchase station WOKY-TV, operating on Channel 19, from defendant Bartell Broadcasters, Inc. ("Bartell"). Without disclosing that he was acting on behalf of CBS, Holt acquired an assignable option to purchase the Bartell station. The transaction was planned in this way in order to enable CBS to acquire a station at a reasonable price and to avoid disclosure of CBS's plans to its competitors. The option agreement made by Holt contained an express provision that the sale was subject to approval by the FCC.

On October 21, 1954, the day before the new Multiple Ownership Rule became effective, CBS gave Midwest notice of the termination of its affiliation agreement effective April 22, 1955. Upon receipt of that notice, plaintiff, who was then President of Midwest, came to New York and protested the termination. I met with him on October 22, 1954. He stated, among other things, that he had incurred large expenditures for a new studio and for equipment which was far more elaborate than that which he would have required for the operation of a station which did not have a CBS affiliation. In the course of our conversation, the suggestion developed that CBS might protect him

against the loss which he feared by purchasing from Midwest the physical equipment for which it had contracted and taking over the studio lease which it had made. Plaintiff repeatedly stated that he intended to continue television broadcasting in Milwaukee but that he would not require the expensive equipment which he had contracted to purchase. Accordingly, it was suggested that CBS might transfer to him the equipment which was then being used by Bartell. Our conversations led to further negotiations which culminated in a meeting held on November 1, 1954, at which it was agreed that Midwest would sell its equipment and assign its studio lease to CBS, and CBS would pay to Midwest the sum of $500,000 and transfer to it the physical equipment of the Bartell station. At the meeting of November 1, 1954, plaintiff reiterated several times in my presence that he intended to continue to operate his station.

Attached hereto, marked Exhibit B and hereby made a part of this affidavit, is a copy of the agreement between CBS and Midwest dated November 12, 1954, which resulted from the negotiations that I have described. It will be noted that that agreement contains an express recital that Midwest had represented to CBS that it intended to continue broadcasting in Milwaukee. CBS entered into that agreement when it found that, by doing so, it could enable Midwest to avoid the loss of which plaintiff had complained and that it might save itself time and some expense by taking over the Midwest equipment. Far from intending to drive Midwest out of the broadcasting business in Milwaukee, CBS was fully prepared to acquire its own studio and equipment and had every intention of doing so until plaintiff complained to it of the injury which Midwest would suffer from the termination of its affiliation agreement.

The assignment to CBS of the license to operate a television station on Channel 19 was approved by the FCC on January 14, 1955. *Bartell Broadcasters, Inc.*, 11 R. R.

913. At the same time, the Commission granted the application of Midwest for a modification of its permit under which it was to move its main studio to the location previously used by Bartell and was to make changes in its antenna and other equipment. I am advised that several documents theretofore and subsequently filed with the FCC by Midwest and plaintiff, stating plaintiff's continued intention to broadcast in Milwaukee, are referred to in the deposition of plaintiff that is submitted on this motion.

2.

THE CHARGE UNDER SECTION 2 OF THE SHERMAN ACT.

There is no basis whatever for the claim that CBS has monopolized or attempted to monopolize interstate commerce in the television industry. I understand that this charge is presented in two ways, relating both to "local outlets" (stations) and to television advertising.

As to stations, officers of CBS have repeatedly asserted in public their desire to have the company acquire the maximum number of television stations permitted by the FCC's Multiple Ownership Rule. That maximum is now seven stations, no more than five of which may be VHF stations. When CBS contracted to acquire its Milwaukee station, it owned three stations,—in New York, Chicago and Los Angeles. The total number of stations then on the air was 386. It is patently absurd to assert that the acquisition of a fourth station, in accordance with announced plans to seek the acquisition of the maximum number permitted under the Commission's Rule, evidenced monopolization of, or an attempt to monopolize, local outlets for televison.

Equally absurd is the effort to base such a charge on the agreements between CBS Television and its affiliates. When plaintiff's affiliation agreement was terminated, the number of stations with which CBS Television had agreements giving it option time was 127, less than one-third of the total number then on the air. All the affiliates are under wholly independent ownership. All the agreements,

the form of which is shown by Exhibit A hereto, comply with the requirements of the FCC's Chain Broadcasting Regulations. The agreements give CBS Television option time during limited portions of the day, and the hours for which the options are actually invoked are substantially less than the total number permitted.

Furthermore, the options are not absolute, and CBS affiliates frequently exercise their privileges to reject programs which national advertisers wish to have them carry during option time. Programs ordered by CBS are rejected in order to carry programs of competing networks. Affiliates exercise their right, under the contract provisions required by the FCC Regulations, to reject network programs which they consider unsuitable and to substitute for network programs those which the affiliates consider to be of outstanding local or national importance.

The clearance of time on affiliated stations during option hours is a problem to which the efforts of CBS Television's sales force are constantly directed. Success in obtaining such clearance varies markedly from program to program. The results depend in large measure on the strength of the program offered by CBS and that of the competing programs which are available at the same time. There is thus no basis whatever for plaintiff's apparent assumption that CBS is to be regarded as in control of the air time of its affiliates, or even of that limited portion of such air time that is subject to the option provisions of the affiliation agreements.

Any claim that CBS monopolized, or attempted to monopolize, the market for national television advertising is also patently groundless. As pointed out in the annexed affidavit of Jay Eliasberg, CBS received approximately 20% of the total broadcast revenues of the television industry in 1954, approximately 43.8% of all television network revenues and approximately 23% of all time sales to national advertisers. These figures completely negate plaintiff's monopoly charge. If further refutation is required,

it can be furnished by abundant evidence that CBS Television has none of the indicia of monopoly power and that its business is marked by intense competition.

Each of the CBS owned stations competes with other television stations in the same market as well as with local newspapers, radio stations and other advertising media. The CBS Television network is in competition for the advertiser's dollar with all the other media of national advertising, including newspapers, magazines, billboards, radio and national spot television. Its customers, the national advertisers, extensively use those other media as well as the competing television networks. Studies made by the company show that in 1955, of the 50 largest CBS Television network customers, 78% also used national spot television and 50% were included in the 100 largest national spot television advertisers; they also show that of the 50 largest CBS Television network customers, 76% also advertise on at least one other television network and 58% are among the 50 largest customers of at least one other television network.

In view of the existence of this competition, CBS clearly lacks the ultimate power of a monopolist,—the power to fix prices. Its charges are determined by its ability to deliver advertising messages to large audiences at a cost which compares favorably with the costs of other means of delivering those messages. The unit in which competing means are compared is that of the "cost per thousand" viewers. A major factor in determining that cost is the size of the audiences reached, and that depends on the attractiveness of the program that is offered. The success of CBS has been due to its accomplishments in programming. It competes intensively with the other networks not only for advertisers but also for talent and for program materials.

While CBS now leads the other networks in its volume of business, it came from far behind to do so. At the commencement of network television, in the first quarter of

1949, the gross billings of NBC were more than double those of CBS. While CBS achieved its present lead over NBC in the first quarter of 1954, the two companies have grown approximately at the same rate since that time; and, during the same period, ABC has made very substantial gains. The history of network television is that of a highly competitive industry; its pattern is wholly inconsistent with that of a monopoly situation, in which a smaller and smaller share of the total revenue falls to those who are behind the leader. Constant efforts at creative programming, as well as the work of a large sales force, are required to maintain the lead which CBS presently enjoys. Few facts in the television industry are clearer than the intense competition which exists among the networks.

s/ RICHARD S. SALANT.
Richard S. Salant.

Sworn to before me this 16 day of September, 1957.

s/ EMILY M. GREEN.

(Seal)

CBS TELEVISION

A division of Columbia Broadcasting System, Inc.

TELEVISION AFFILIATION AGREEMENT

AGREEMENT made this 21st day of August, 1953 by and between **CBS TELEVISION**, a division of Columbia Broadcasting System, Inc., 485 Madison Avenue, New York 22, New York (herein called "CBS Television") and Midwest Broadcasting Co., 723 North Third Street, Milwaukee, Wisconsin (herein called "Station") licensed to operate television station WCAN-TV at Milwaukee, Wisconsin full time on a frequency of 536-542 m.c. on Channel number 25.

CBS Television is engaged in operating a television broadcasting network and in furnishing programs to affiliated television stations over program transmission facilities leased by CBS Television, by "off-the-tube" TV recordings, or otherwise. Some of such programs, herein called "sponsored programs", are sold by CBS Television for sponsorship by its client-advertisers. All non-sponsored programs are herein called "sustaining programs". "Network sustaining programs", "network sponsored programs" and "network programs" as used herein mean network television programs. Station and CBS Television recognize that the regular audience of Station will be increased, to their mutual benefit, if CBS Television provides Station with television programs not otherwise locally available.

Accordingly, it is mutually agreed as follows:

1. CBS Television will offer to Station for broadcasting by Station network sustaining programs as hereinafter provided, without charge, and CBS Television network sponsored programs for which clients may request broadcasting by Station and which are consistent with CBS Television's sales and program policies. Network sustaining programs made available by CBS Television are for sustaining use only and may not be sold for local sponsorship or used for any other purpose without the written consent of CBS Television in each instance.

2. (a) Station will accept and broadcast all network sponsored programs offered and furnished to it by CBS Television during "network option time" (as hereinafter defined); provided, however, that Station shall be under no obligation to accept or broadcast any such network sponsored program (i) on less than 56 days' notice, or (ii) for broadcasting during a period in which Station is obligated by contract to broadcast a program of another network. Station may, of course, at its election, accept and broadcast network sponsored programs which CBS Television may offer within hours other than network option time.

Exhibit A to Salant Affidavit

(b) As used herein, the term "network option time" shall mean the following hours:

(i) if Station is in the Eastern or Central Time Zone,

Daily, including Sunday, 10:00 A.M. to 1:00 P.M., 2:00 P.M. to 5:00 P.M. and 7:30 P.M. to 10:30 P.M.

(expressed in New York time current on the date of broadcast);

(ii) if Station is in the Mountain or Pacific Time Zone,

Daily, including Sunday, 10:00 A.M. to 1:00 P.M., 2:00 P.M. to 5:00 P.M. and 7:30 P.M. to 10:30 P.M.

(expressed in local time of Station current on the date of broadcast).

3. Nothing herein shall be construed (i) with respect to network programs offered pursuant hereto, to prevent or hinder Station from rejecting or refusing network programs which Station reasonably believes to be unsatisfactory or unsuitable, or (ii) with respect to network programs so offered or already contracted for, (A) to prevent Station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or (B) from substituting a program of outstanding local or national importance. CBS Television may, also, substitute for one or more of the programs offered hereunder other programs, sponsored or sustaining, of outstanding local or national importance, without any obligation to make any payment on account thereof (other than for the substitute program, if the substitute program is sponsored). In the event of any such rejection, refusal or substitution by either party, it will notify the other by private wire or telegram thereof as soon as practicable.

4. Station will not make either aural or visual commercial spot announcements in the "break" occurring in the course of a single network program or between contiguous network sponsored programs for the same sponsor where the usual station break does not occur.

5. CBS Television will pay Station for broadcasting network sponsored programs furnished by CBS Television at the rates specified in Schedule A, attached hereto and hereby in all respects made a part hereof. Payment to Station will be made by CBS Television for network sponsored programs broadcast over Station within twenty (20) days following the termination of CBS Television's four or five week fiscal period, as the case may be, during which such sponsored programs were broadcast.

6. CBS Television will offer to Station for broadcasting such network sustaining programs as CBS Television is able to deliver, or cause to be delivered, to Station over co-axial cable or radio relay program transmission lines under arrangements satisfactory to CBS Television. CBS Television shall not be obligated to offer, or make available to Station hereunder, such network sustaining programs as it may have available in the form of TV recordings, unless CBS Television has the right so to do and Station shall agree to pay CBS Television's charges therefor.

7. When, in the opinion of CBS Television, the transmission of network sponsored programs over co-axial cable or radio relay program transmission lines is, for any reason, impractical or undesirable, CBS Television reserves the right to deliver any such program to Station in the form of TV recordings, or otherwise.

8. Station agrees to observe any limitations CBS Television may place on the use of TV recordings and to return to CBS Television, transportation prepaid by Station, immediately following a single broadcast thereof, at such place as CBS Television may direct, and in the same condition as received by Station, ordinary wear and tear excepted, each print or copy of the TV recording of any network program, together with the reels and containers furnished therewith. Each such TV recording shall be used by Station only for the purpose herein contemplated.

Q. Will you produce your file of correspondence with Mr. Chrisler at an adjourned examination. Will you please do so. (87) A. I have made a note of that; yes.

Q. You said that you also had an oral approach on the subject? A. From Mr. Storer.

Q. Yes; from Mr. Storer. A. Many, many conversations with him.

Q. Do you know the approximate dates of those conversations? A. Somewhere around March in 1954, he invited me to a meeting of broadcasters with Senator Potter. I talked with him then. During the hearings of the Potter Committee, I talked with him a number of times, and—

Q. Were both of those meetings in Washington? A. The Potter hearings were held in Washington.

Q. And the prior meeting? A. And the meeting was also in Washington, yes.

Q. Yes. A. And in New York, at Al Schacht's Restaurant.

Q. When? A. During the summer of 1954.

Q. Let us take the earliest of those meetings, the meetings at which he invited you in March. Do you remember the substance of your conversation with him on that occasion? A. He asked me whether I had heard from Mr. Crisler, and I said, yes, I did. And he said, "As soon as the Commission makes a decision on that 5 and 2, I will sit down and talk (88) with you in detail."

At the Potter hearings, we discussed it a number of times, and he discussed the 5-and-2 ruling with me. I told him we had no objection against it, and that the UHF association was not going to file any objection against it. And he again reiterated that he wanted a Milwaukee market, that he had to have UHF; he had his limit of V's, and that he would contact me just as soon as the 5-and-2 rule was adopted.

In New York at Al Schacht's, he told me he understood the rule was on the agenda to be adopted and that he would get hold of me within a week or so the moment it did come through.

Q. In any of those conversations was price mentioned? A. At the hearings in the Senate building, he asked me what volume I was doing. He was rather surprised to hear what I was doing. And we did discuss the figure that I had given Mr. Crisler.

Q. You had quoted a price to Mr. Crisler? A. No. Mr. Mr. Crisler first offered me a price, and I told him I wasn't interested in selling. But when he came back and offered a second price, when he knew what my figures were, those figures I negotiated.

Q. Were those offers made by Mr. Crisler in writing? A. No. He talked to me by phone.

(89) Q. What was your asking price for the station? A. I never gave him an asking price. I told him that I was not interested in selling the station as long as I could keep it running the way I was. And he said everything had a price. His first offer was a million and a half, and I told him I wasn't interested. He reminded me it was a UHF station and that no UHF station ever brought that price. I told him, no UHF station did the job that we did, either.

He asked me what kind of job we did. And I told him what my volume was. At first he did not believe it, and I said, "I will send you all the figures if you want them."

He said, "Yes. Send them to me."

And I did. He then called me back and asked me if I would accept $2,000,000. I told him, that figure I would consider.

Q. Was anything said in those conversations about the CBS-affiliation agreement? A. By whom?

Q. By either you or Mr. Crisler or Mr. Storer. A. No. Nothing was discussed on the agreement.

Q. The figures that were under discussion were not in any sense contingent upon the existence of an affiliation agreement? A. No, except that Crisler and I had often discussed, (90) wherever Storer goes, he would have no difficulty keeping the CBS agreement; any market he went in, he would have no difficulty in keeping it.

Q. Who said that? A. Crisler.

Q. So that you understood that he was thinking of the station in terms of one carrying the CBS programs? A. I would think that is what he had in mind.

Q. When did you last discuss the subject with Mr. Storer? A. Either July or August of 1954 at Al Schacht's.

Q. What did he say then? A. That he understood the 5-and-2 rule was on the agenda to be acted on it should be acted on within the next two or three weeks. He said, "I am coming up to Milwaukee and get your station."

Q. What did you say to that? A. I didn't say anything. It didn't require an answer.

Q. Did you discuss the subject with Mr. Storer after the 5-and-2 rule was adopted? A. No, I did not.

Q. Did you ever discuss the CBS Milwaukee purchase with Mr. Storer? A. Oh, yes.

(91) Q. When did that discussion take place? A. After CBS had bought WOKY and canceled our affiliation. I was in Miami. That was in December, 1954. I talked with Storer then.

Q. You talked with Mr. Storer. And what was the substance of that conversation? A. I asked him what happened after the meeting in New York when he told me has was going to see me. I never heard from him any further. And he said he still would love to have Milwaukee, and that he wanted to buy it, but CBS told him that he could not have it, that they wanted it. He said, "You know, I can't fight with them."

In fact, he offered me a job to take over his UHF operation in Miami.

Q. Were those his exact words, to the best of your recollection? A. Yes.

• • •

(128) Q. In the first paragraph of the letter that has been marked Exhibit 5 for identification, you refer to CBS retaining WCAN-TV as an affiliate over Channel 12, and state that it was the first indication that "we had earned the right to call ourselves a CBS station." You had been

calling yourself a CBS station ever since you went on the air, had you not? A. Sure.

Q. As a matter of fact, you had the CBS insignia on your letterhead from the very beginning, did you not? A. Certainly, with trepidation.

Q. You had that same trepidation during the entire period that you were affiliated with CBS, did you not? (129) A. You are so right.

Q. And you still had that trepidation when you wrote this letter of September 21, did you not? A. I did.

• • •

(144) Q. You testified last time that Mr. Crisler said—

Mr. Doskow: I am referring, Mr. Freedman, to pages 89 and 90 of the transcript—

By Mr. Doskow:

Q. —Mr. Crisler and you had often discussed wherever Storer goes he would have no difficulty keeping the CBS agreement, and that you understood that he was thinking of the station in terms of one carrying the CBS programs.

Does that refresh your recollection as to whether you discussed that matter with Mr. Crisler? A. No, it doesn't refresh it. It would sound like a thought that I would have and that he would have, but if I had said so I might have remembered it better then than I do now.

I think the record indicates pretty well (145) wherever Storer goes he has no difficulty getting a CBS affiliation.

Q. Is the record not equally consistent with Mr. Storer's going only where he has knowledge that he can have a CBS affiliation? A. It might very well be.

Would you repeat that statement.

(The pending question was repeated by the reporter.)

A. I would think so.

By Mr. Doskow:

Q. You knew very well, did you not, that you would not have an offer from Mr. Storer if he didn't think he would

have a CBS affiliation? A. Oh, I thought he was pretty sure he could have it.

• • •

(146) Q. Did you ever receive an offer to purchase station WCAN-TV? A. Yes.

Q. When did you receive that offer? A. Mr. Crisler made me that offer on the phone prior to my sending him the information I designated before.

Q. Was that in the telephone conversation of January 11? A. No, it was subsequent to that, within a week or so, subsequent to that conversation.

Q. A week or so after the letter of January 11? A. That's right.

Q. What did Mr. Crisler then say? A. That he had talked to Mr. Storer, that Mr. Storer would (147) give us $2,000,000 for the station as soon as the FCC would permit him to own additional stations.

There was a rule-making pending before the FCC. He said as soon as that was approved he wanted the station.

Q. That was over the telephone? A. Yes.

Q. Did you accept the offer? A. Yes.

Q. You said, "All right, I will sell it to Mr. Storer for $2,000,000"? A. That's right.

Q. Do you remember more than one telephone conversation with Mr. Crisler after January 11, 1954? A. I had a number of them but I can't place them in any particular sequence, unless I run into more correspondence that I had with him.

Q. But you do remember a conversation about a week after that date? A. Oh, yes.

Q. Did you make any memorandum of that conversation? A. No, I just complied with his request and sent him the information that he wanted.

Q. Was it in that same conversation that he asked for more information? (148) A. He asked for documents substantiating the information that I had given him. I told him what our sales figures were on this and he asked me

for the financial statements and coverage maps, ratings. I told him what our conversions were at that time. He wanted figures on that, too. ARB ratings.

Q. Did you answer the letter of August 20, 1954, Exhibit 10? A. I have not located any of my replies to Mr. Crisler. I did have a file on him. You notice these are all filed in the personal file (indicating).

Mr. Freedman: Witness is pointing to the pencil writing on the exhibit which says "file personal."

Mr. Colin: D-10.

By Mr. Doskow:

Q. Do you recall whether you answered that letter? A. No, I do not recall.

Q. Do you recall any meeting with Mr. Crisler after August 20, 1954, in this connection? A. I don't recall meeting with him personally on this matter at all.

Q. Do you know Mr. Crisler personally? A. Oh, yes; yes, very well.

Q. Do you recall any personal meetings with Mr. Storer (149) on this matter? A. Yes, quite a number of them.

Q. When did those meetings take place? A. The first one was in March, '54, in Washington.

This (D-8-A) might help me. It may have been in April. It was at a meeting that he called of other broadcasters to meet with Senator Potter, prior to the Potter hearings of 1954. I was asked to attend.

Q. What conversation did you have with Mr. Storer at that time about the sale of your station? A. He told me he had talked to Crisler and that as soon as the Commission would approve the 5-and-2 rule he would do business with us.

Q. Was a price mentioned at that meeting? A. That is all that was mentioned, this one statement.

Q. Do you remember any later meetings with him on the subject? A. Yes. I met him at the Potter hearings,

which I believe were held in May, in Washington, and we discussed UHF generally. He asked me what volume our station was then doing, what rate of conversions we had and whether I had heard whether or not the FCC had taken any action in the 5-and-2 ruling and also what my position was as to UHF operator, whether I was going to oppose the 5-and-2 ruling. And of course I told him (150) I wasn't. I did not oppose the 5-and-2 ruling. In fact, the UHF Association came out in favor of it.

We met for almost a whole week practically every day and there were always some discussions about the Milwaukee market generally.

Q. Did you discuss the sale of your station at any of those meetings? A. Well, he reiterated the same position. He didn't have—

Q. Just what did he say? A. That as soon as he is able to get to Milwaukee he wants that market, as soon as the Commission would approve that, that he would buy the station in Milwaukee.

Q. Was the price mentioned at any of those meetings? A. I don't recall. It may have been. We never belabored the point since it was something the FCC had to do, not us. We couldn't do anything about it until that took place.

Q. Well, the FCC wasn't going to fix the price. A. I say we didn't belabor the entire point since we could not close the deal.

Q. Since the whole matter— A. Depended on their approving 5-and-2.

Q. Yes.

Now, at any of those meetings with Mr. Storer was anything said about a CBS affiliation? (151) A. No, no, it was never discussed.

Q. Do you recall any later meetings with Mr. Storer on the subject? A. Yes. I met him in New York at Al Schacht's, late in July. It would appear to be around July 28.

By Mr. Freedman:

Q. What year? A. 1954. He was having lunch with someone from his organization, with Mr. Akerberg and a few of the men from Mr. Akerberg's staff, and he called me over, and in front of all these people he said, "The Commissioners are going to act on that 5-and-2 any day now and I am coming up to Milwaukee for your station."

And Mr. Akerberg called me aside and said he wanted to see me after that.

By Mr. Doskow:

Q. Did you go to see Mr. Akerberg after that? A. I did. I went up to his office. Mr. Akerberg told me that I was under no compulsion to sell the station to anybody, that they were very happy with the job I was doing and he wanted me to know that as far as they were concerned I didn't have to sell to Storer or to anybody else at the point of a gun, is the way he put it.

Q. And that conversation you place at the end of July, (152) 1954? A. It appears to be somewhere in July. It may have been August. I know it was during the summertime.

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(153) Q. Had you prior to that meeting discussed with Mr. Akerberg the possible sale of your station to Mr. Storer? A. Yes, I talked to Mr. Akerberg in Chicago during the NARTB convention in May. Mr. Rosenman and I both talked to him for an hour or more, and I told him then that if I knew I could keep my affiliation and continue to do a job for them that I wasn't interested in selling the station.

This was when Channel 12 had just been granted, and we were of the opinion that Channel 12 might get the affiliation, and it was at that meeting that Herb Akerberg assured us that 12 was not going to get it, that they preferred staying with us.

Q. That was in May? A. Yes, during the NARTB convention in Chicago.

Q. Well, had you not in January accepted Mr. Crisler's offer of $2,000,000? A. Yes, sure I did.

Q. So that you had agreed to sell? A. Contingent to the grant of the 5-and-2.

Q. I see. (154) A. Which had not taken place yet.

Q. But despite the fact that you had agreed to sell, you told Mr. Akerberg that you wouldn't sell if you could keep the CBS affiliation, is that correct? A. Certainly.

Q. Was that meeting in the summer of 1954 the last meeting that you had with Mr. Storer on the subject? A. That is the last I heard from him.

Q. Did you ever discuss it with him afterwards? A. No.

Oh, did I ever discuss why he hadn't bought it or—

Q. Did you ever discuss the subject of a possible sale afterwards? A. Oh, sure. Oh, yes. After I was out.

Q. But not between the end of July or the date of that summer luncheon and the time when you sold to CBS? A. No.

Q. When the Commission announced the adoption of the 5-and-2 rule, on September 17, I believe, did you at that time call Mr. Storer? A. I did not.

Q. Did Mr. Storer call you? A. What was the date you said? On December—

(155) Q. I believe they announced it on September 17, 1954, to be effective October 22. Is that correct? A. That is correct.

Q. So that between September 17 and October 22 you knew that that rule had been adopted? A. That's right.

Q. During that time there was no communication whatever between you and Mr. Storer? A. No. I didn't have the station up for sale. I was not the aggressor.

Q. And you didn't hear from Mr. Crisler? A. I did not.

• • •

(167) Q. Mr. Poller, you recall, do you not, that under your contract of November 12 CBS assumed all of the

contracts that you had made for the equipment of the Studio Building? A. They assumed the liability for a list that was submitted to them of work in progress for the building to be completed.

• • •

(168) Q. Were you reimbursed in full for what you had spent on that Studio Building? A. Yes.

• • •

(173) Q. Well, did you represent to CBS, had you orally represented to CBS prior to the time you signed this contract, that you intended to continue the operation of the station? A. I was pretty well left to undersand that if I didn't there was no deal.

Q. I didn't ask you that. I asked you whether you did represent to CBS that you intended to continue the operation of the station. A. The contract so states.

Q. I see. And you signed the contract? A. I did.

Q. Was that representation false? A. Oh, I don't think it was false. I am sure they understood and I understood it was window dressing.

Q. Did you at that time intend to continue the operation of WCAN? A. Maybe 5 per cent.

Q. To operate what? A. You asked me how much. I had about a 5 per cent hope that I might be able to continue. It was 95 per cent certain that I couldn't. They knew it and I knew it.

Q. In other words, your testimony is that the representation was false but that CBS knew that it was false, is that (174) your statement?

Mr. Freedman: I object to that. I don't think there is any necessity for categorizing what the witness has already very clearly said in answer to the questions that have heretofore been asked.

Mr. Doskow: If the answers were so clear, Mr. Freedman, I wouldn't have done so. I am trying to understand—

Mr. Freedman: That doesn't necessarily follow. I would say from observation it would generally be true, but I think in this instance it is not.

By Mr. Doskow:

Q. Was it a truthful representation to CBS that Midwest intends to continue the operation of WCAN? A. In the way you phrase it it is like, "Do you still beat your wife?"

I made the representation, they knowing and I knowing that the odds were 20 to 1 against me being able to continue. The issue was never stressed. It was brought up. I knew I had a gun at my temple. I had to say yes and I said yes and then I made every effort to try to comply.

Q. Who told you that you had to say yes. A. Mr. Salant.

Q. What did he say? A. At the very first meeting.

(175) Q. What did he say? A. "You know that we are not driving you out of business and we don't want to drive you out of business."

And I said, "Well, what do you call this?"

He said, "Oh, you are a good operator and you know you can continue this. You are one of the best in the business."

Q. Was that statement made before an agreement was reached that CBS would buy your equipment? A. Yes.

* * *

(249) Q. * * * The injury that you anticipated and were concerned about at the time of your testimony before the Senate Committee was the possibility that CBS might terminate your affiliation agreement in order to affiliate with a VHF station; is that correct? A. No. That was the condition that I said may prevail.

Q. Well, weren't you— A. There were applications pending for it.

(250) Q. Yes. A. The applicants had stated that they had CBS programming. One of the applicants in his programming before the FCC included CBS programming.

Q. Didn't you explain to the Committee your concern that some other station might become a CBS affiliate in Milwaukee? A. I sure did.

• • • •

(251) Q. • • • You testified that the station was operating profitably but its life span could be extremely short. Do you recall that? A. I do.

Q. When you were asked whether your main concern was that if another VHF were granted in Milwaukee you would lose your network affiliation and therefore you would not have the programs to be competitive, your answer was yes. A. That's right. I was so advised by CBS.

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(252) Q. You were asked by Senator Pastore the following question:

One of the things you complained about is the fact that if the VHF comes in in Milwaukee you may at the expiration of your contract lose your contract with CBS. Is that right or wrong? A. That's right.

Q. And you answered:

But I do not think that could be changed by legislation. I believe that the advertiser spends him dollar where he think it is best.

(253) And then you said:

If I had the choice between four networks I would certainly fight to get CBS or NBC, and conversely if they have the choice, the cahin being no stronger than its weakest link, they will take the strongest affiliate, but if the affiliates are equal technically, they will buy management. A. That's right.

Q. Do you recall that testimony. A. Oh, sure.

Q. Your viewpoint hasn't changed on that? A. Not at all.

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(259) Q. You think your station was stolen? A. We said so.

Q. I see.

If CBS had entered into an affiliation agreement with Channel 12, would that have been a theft? A. No, I would think it was bad judgment.

Q. But then you would have had no complaint? A. They would only pick one affiliate over another. They seldom do it, but they would have done it then.

Q. In that event, you would have had no complaint? A. I don't know whether I would or not. It didn't happen.

Q. Do you know what the purpose was of CBS acquiring a station in Milwaukee? A. Sure, they coveted the market.

Q. What does that mean? A. They had big eyes.

Q. Does that mean anything? (260) A. We took an impossible situation and made it into a good one.

Q. Does that mean anything other than they wanted a station there to make money on it? A. I think you could answer for that better than I could.

Q. I am not answering; you are answering. A. I don't know why.

Q. You don't know why; all right.

I asked you whether you knew. A. They never told me.

Q. I see. So you don't know what their purpose was in acquiring a station in Milwaukee? A. Except to own it.

Q. I see. A. It was a good operation. They would like to own it.

Q. You think they wanted to do it in order to hurt Lou Poller? A. I don't think they entered into it—they didn't care who they hurt if it satisfied their purpose.

Q. I see.

Do you know what the purpose of Bartell Broadcasters was in selling its station to CBS? A. I don't know—I don't know if he knew he was selling it to CBS. He never told me. I know he had an unsuccessful (261) operation, and I had a successful one, and when you have something unsuccessful, you might want to get rid of it.

• • •

Q. Do you know Mr. Holt? A. No, I do not.

Q. Do you know what his purpose was in acquiring the option? A. I do not.

Q. You know of no reason why either Mr. Holt or Bartell would have had any purpose to put you out of business? A. I don't think my well-being was of any interest to them one way or the other.

• • •

(265) Q. Your complaint charges a monopolization or an attempted monopolization by CBS of trade and commerce in the television industry. Do you understand what those words mean? A. I think so.

Q. What is the trade that you claim that CBS is monopolizing or attempting to monopolize? A. The trading, advertising in the television trade, the advertising.

Q. Anything more? A. Any more? I think not in particular.

Q. You think throughout the— A. I think they laid their hands on as much as they could get.

Q. Do you think throughout the United States, or are you referring specifically to Milwaukee? A. Anywhere, anywhere they could happen to get it.

Q. I see.

And the attempt to monopolize that you are complaining about is an attempt at a nation-wide monopoly, not a monopoly in Milwaukee? (266) A. Milwaukee is a part of the national pattern.

Q. But I asked you what the area of the alleged monopoly is. A. The United States.

Q. You just looked at Dr. Stanton's testimony about the competition among the three networks.

Do you disagree with anything he said on that subject? A. I disagree with a lot of it. Dr. Stanton says a monopoly only exists when they control two-thirds of the market.

Q. Do you understand there to be competition between CBS and NBC and ABC? A. Do I understand that there is competition?

Q. That there is a competition between them. A. I don't think so.

Q. You don't think so. You think they work together? A. I know of many instances where they do.

Q. In this alleged conspiracy to monopolize the advertising industry, do you think that there is a conspiracy among CBS, NBC and ABC? A. No, I think each one would like to control it if they could.

Q. I see. Each one. Aren't the three competing with each other for as much of it as they can get?

DEFENDANTS' EXHIBIT 35 FOR IDENTIFICATION

July 19, 1954

Richard Crisler,
Yale Club,
44th and Vanderbilt,
New York City, N. Y.

Dear Dick:

Enclosed is a floor plan of the new building. We plan to contract for this within the next few days on a lease basis (10 years) with an option to buy it after 5 years at a fixed price.

We have agreed with the local parties for the purchase of the radio station; however, I do not consider it a sale until the deposit and letter offer are in my hands. I consider George's interest in the same light.

Despite the adverse publicity of the Channel 12 grant (they merged early in May) our figures have held up in the neighborhood of $110,000 monthly. Starting with August our $500 rate becomes effective with CBS and we will probably go to $600 or $700 with them on September 1, effective March 1, 1955. We anticipate our volume to run around $130-$140,000 a month as of September thru the balance of the year.

Since you and I first talked, we have added almost $200,000 in equipment for the new transmitter and a remote camera chain. We have spent a good deal of money defending our position in Washington.

I want to repeat: I know what I can do with the operation. I am satisfied that we are over the hump as far as CBS is concerned. If George waits until the FCC adopts the 5 and 2; I may find myself in between CBS and George in which case I will fight to keep it myself, status quo.

In plain English; if George wants it, we should meet soon, agree on a figure; he should put up a 10% check and letter offer, subject to the usual FCC approval and the 5 and 2. Lacking that, I cannot feel that his 'interest' is more than speculative. We have not placed our *firm* order for the directional antenna. However, Herb Akerberg at CBS has our coverage study and has asked me not to give it to anyone else. If Herb wants to show it to George, he can. It's your move.

Regards,
Lou Poller

DEPOSITION OF THAD HOLT

(3) THAD HOLT, one of the defendants appearing herein, having been first duly sworn by the Notary Public, testified as follows:

By Mr. Freedman:

• • •

Q. What is your business? A. Management consultant?

Q. What does that mean? A. Well, in addition to investments of my own, I have acted as management consultant to several television and radio stations.

Q. What does that mean, you have acted as management consultant to several radio stations? A. Well, in the case of the—well, would you like to (4) have specific examples?

Q. Yes. A. Well, in the case of the New Orleans Times-Picayune, in their application.

Q. You assisted them in their application? A. That's right.

Q. For a radio license; is that is? A. For application for construction permit for television.

Q. What is your general day-to-day business? Do you operate any radio or television stations? A. Not at this time.

Q. Have you ever operated any radio or television stations? A. Yes, sir.

Q. Tell us about when and where and what. A. From 1937 until 19—I think it was '53, we had radio station WAPI in Birmingham, Alabama. We established the first television station in Alabama, Channel 13, in Birmingham. I believe it was—we sold it out in 1953 to the Birmingham News Company, and I think we had it about four years at that time. All these times they were affiliates of CBS.

• • •

(7) Q. Just what do you mean by management consultant? A. Well, from my experience, my years in the television and radio business, from time to time I have been called on to perform various functions from advice in construction or advice in procedures, perhaps, and in hearings.

Q. Anything else? A. Well, in a couple of years of cases I was asked to help in the purchase of stations, one of which I didn't consummate.

• • •

(9 Q. Well, let's see if I can't restate it for you.

As I understand what you said about the nature of your activities, your special field of activity lies in that of the management consultant to various radio and television stations, and that that is the primary nature of your activity, although from time to time, in a subsidiary way, you have acted on a few occasions in regard to the acquisition of radio or television stations. A. I am afraid I have given you the wrong impression that (10 radio and television is the only thing I do. I mean, frankly, I have kept my offices since we sold our stations and I have worked with banks and other things. I was Chairman of the Federal Reserve Board, and after I finished by duties with that, I even helped in the merger of two banks and a few other things like that. That's the only reason that I am questioning—I'm not questioning your assumption except that I would just like to make the record clear as to exactly—I mean, it's a rather vague type of activity from that standpoint because I have had many investments since we have sold our business.

Q. When you said you are a management consultant, you meant radio and television management consultant? A. I say I don't specify radio and television, but naturally I have been in that business longer than anything else, and I presume I was called to do that more than I was to help with banks and other things that I may have been interested in, because I have stock ownership in various companies which have problems, and from time to time they ask me if I will help do certain things.

Q. Are you engaged actively in business today? A. Not in what I'd call day to day management of a business. I have investments in businesses.

(11) Q. May I ask how old you are? A. I am 59.

Q. Did you have any business dealings with Columbia Broadcasting Company at any time other than the transaction that we will get to a little later on in Milwaukee? A. Oh, goodness, since 1936, I've been very closely associated. Probably the only business interest I had was in connection with radio and television, an affiliate. At one time they were actually business partners of ours.

Q. CBS? A. Yes. They owned 45 per cent of our corporation at one time.

Q. What was the name of the corporation? A. Voice of Alabama, Inc.

Q. Voice of Alabama? A. Inc.

Q. That was a radio station or chain? A. No, just a radio station. It later founded a television station. As I remember it, they sold us their interest back before the television was founded.

My point is that I have been very closely associated with them, I think, since '36, as I remember. That's when we took over WAPI.

(12) Q. They were business partners with you in the Voice of Alabama, Inc.? A. That's right.

Q. And they owned a 45 per cent interest? A. Yes.

Q. They also had an affiliation arrangement with companies or stations that you were interested in? A. Yes, I think—

Q. Which ones? A. I—what do you mean? The Voice of Alabama, Inc.? We were their affiliate for the whole time I was in the business.

Q. How long was that in business? A. I think '36 till we sold out to the Birmingham News. I believe it was in '53. I don't want to be held to dates exactly, but I think it was '53.

• • •

(13) Q. I presume you know high officials of CBS? A. Very well.

Q. Do you know their president, Mr. Stanton? A. Yes, very well.

Q. Do you know their other high officials, generally? A. Generally During recent years, of course, naturally (14) they have changed in the last three or four years, but I was very close to them all through my active career.

* * *

(18) Q. The only interest that you thus far told us about, or connection or association that you have had with CBS, was: number one, when they owned a 45 per cent stock interest in the Alabama station or stations, and I am leaving that vague for the moment, whether there were others— A. I am pretty sure they were not in the television. I think I can say that. But I would like to know the date. But I'm pretty sure they were not in the television.

Q. So that they had a 45 per cent stock interest in the radio station? A. That's right.

Q. And then the station and the TV station, too, were both the affiliates of CBS? A. That's right.

Q. Other than that, did you have any relationship with CBS? A. Oh, yes. Radio Sales represented us as a national representative.

Q. Who is Radio Sales? A. That's the national spot sales representative.

Q. What do they have to do with CBS? A. Well, they're owned by CBS. It's a branch of CBS which represents, in addition to their own owned stations, it (19) represents certain stations around the country who are on the CBS network but are not owned by them.

Q. So that they represented you in the selling of time? A. That's right, that's right, of what we called non-network time, national spot time, which is other than local.

Q. And they represented you for what stations? A. WAPI.

Q. That is the only one? A. That's the only one I can answer to.

Q. That is the only one you ever were interested in? A. That's right.

Q. So that you got to have your close association with CBS really as a result of their representing you in the sale of national spot time on this one station? A. And the network.

Q. And the sale of network time for the same station? A. That's right.

Q. That station being— A. Which is day to day business dealings.

Q. And in the course of such day to day business dealings, you came to know their president and vice presidents and other high officials pretty well? (20) A. Oh, yes.

Q. It brought you to New York from time to time to consult with them? A. Naturally we had meetings of the whole group that they would represent from time to time.

Q. So that you worked intimately with them? A. Very much so.

• • •

(23) Q. You swore, on February 26, 1957, before a notary public named Lois Miller Williams, to an affidavit in this case. Do you remember that? A. Yes.

Q. Was she your secretary? A. No, she's the—we only have a part-time secretary—she's in the next office and is a notary.

Q. Who prepared the affidavit that you signed? A. Originally Mr. Doskow called me and went over the items of it, and I asked if he would send me a rough draft. I had my own attorney in Birmingham go over it and I signed it.

Q. What is his name? A. Paul Johnston, Cabaniss & Johnston.

Q. Did you make any changes in the affidavit before you signed it? A. Oh, I may have corrected one or two several small items.

• • •

(26) By Mr. Freedman:

Q. The change that you made dealt first, on the face of the paper, with the striking out of the words that you were a partner in the firm of Norton & Holt; and instead, it was put in the first person that it was you who were acting and not that you were acting on behalf of a partnership? A. That's right.

• • •

(29) Q. Other than that change on the first page and then a change on the second page where you struck out the words, "I had been acting for CBS," and instead—well, just struck them out— A. Certainly. I did not tell Lee Bartell I was acting for CBS, period.

Q. That is why you struck it out? A. Certainly. That's not a statement of fact.

Q. And the rest of it is unchanged? A. In other words, these were two that were not a statement of fact. Have I answered your questions?

• • •

Q. Did you know any of the Bartell Brothers prior to your going to Milwaukee on the incident that is involved in (30) this suit? A. No, sir. Frankly, I had never heard of them.

Q. Did you know Lou Poller prior to your going to Milwaukee on this same incident? A. I have never met him.

Q. Have you heard of him? A. It seems to me that he was the one, as I remember it, that was very active at one time—I think his name was in the trade journals as active in the UHF or something, that's all I remember. I vaguely just remember the name.

Q. But you didn't know him? A. Never met him, no.

Q. I wish you would tell us how you came to go to New York, and then from there how you came to go to Milwaukee with regard to the acquisition of the station there for CBS. A. You mean—

Q. Tell us what occurred. Tell us the whole story without my having to bother to ask you this or that specific question; and the more of it you tell us, the less I will have to ask you questions.

Q. Well, I tell you, it's covered in the affidavit pretty generally, I think. But I had been very closely associated (31) probably with Howard Meigham as the manager of Radio Sales, who was selling the day-to-day non-network time for our radio stations, as much as any one man, I presume, with CBS, in the regular operations. We had built up a great deal, I think, of mutual confidence, and our knowledge of the business, and he called me and—I can't remember the dates. It was covered in this affidavit. But he called me and asked if I would undertake a negotiation for them in the purchase of UHF station in Milwaukee. This has been three or four years ago, and I'm trying to give it to you in chronological order.

He asked if I would come to New York and discuss the matter to see if I would undertake it. So I went to New York.

Q. He called you on the phone, I presume? A. Yes, he called me on the phone.

Q. How soon afterward did you go to New York? A. Frankly, I can't remember. Probably within a week or ten days, I would say. I just don't remember.

Q. Go ahead. A. So I went to New York and met Mr. Meigham and Mr. Stanton and a group of other executives.

Q. Do you remember who else was there? (32) A. Gosh, I can't remember. This is three or four years ago.

Let's see. I remember that—I'm trying to think of who sat at the table. I remember that Bill Lodge, the Chief Engineer, was present, and that Mr. Akerberg, who was the station relations, I believe, for television. I don't know what his title was. And Mr. Van Volkenburg, who was the head of the television network.

Q. He was the head of the television network? A. As I remember it. I frankly don't know the titles of these people.

Mr. Doskow: Just name them.

Q. Tell us what their titles or positions were as far as you know. A. I just don't know. I think at one stage he was—I don't know what he was at that point. That's my point.

And then, of course, Stanton was there and Meigham.

Q. What was Stanton's position, do you know? A. Well, Lord, he's the head of the company. But they got CBS, Inc., they got CBS Television. I don't know what they call him now. But he was the president and head of the company.

Q. Was Van Volkenburg head of the TV? (33) A. I presume so.

Q. Head of CBS TV? A. I think that's what it was.

Q. How about Akerberg? What was he, do you know? A. Well, Herb Akerberg was always station relations. I don't know whether he had both the radio and TV then, but I've known him through the years and been very closely in contact with him as an affiliate.

Q. How about Mr. Lodge? A. He was chief engineer of everything, I think. I don't know.

Q. How about Meigham? A. I don't know. He was on the 20th floor.

Q. That is where he was. What was he? A. I don't know. I don't know what the title might have been. At one time he was president of the CBS radio network, but I don't know just what it was at that time.

Q. I wish you would go back for a moment and tell us what it was that Meigham said to you when he telephoned you. You were in Alabama, I presume, and he was in New York? A. That's right.

Q. He telephoned you one day; what did he say? A. Well, as I remember—and I can't remember the details (34) of it—the two things that I remember that were said was that if the FCC allowed the networks to own a UHF station, and as I remember it, that was some ruling in the works at that time, that they would like to be in the position to buy a UHF station.

Q. Did he tell you which one? A. Not at that time. When I got up there they did.

Q. Did he say in what city? A. He said in Milwaukee, and that they particularly— Now, I can't remember whether he said this over the phone or not, but it came out—that particularly—I presume this is proper to say—that they did not want NBC to know what they were doing. I think that's perfectly fair, as a competitive statement.

Q. Did you have any relationship with NBC? A. No, sir.

Q. Did you have any relationship with ABC? A. No, sir.

Q. Or Dumont? A. No, sir.

Q. Were you told what would be in it for you to do all this? A. Well, that was discussed when I got up there.

(35) Q. Not when you were talking on the phone? A. He says, "Just come up and talk about it." He says, "What do you think of your doing it?"

I just didn't know whether I wanted to do it or not.

Q. He asked you what you would think of doing it? A. Whether I would consider doing it. I mean, there was no negotiation. He just said, "Could you come up and talk to us about it?"

I think I better put it that way because no real action was taken until I got up here and it was discussed.

Q. But when he talked to you on the phone, did he make it clear to you what your role was to be; that you were not going to buy a station for yourself, but that you were going to buy it for them? A. Oh, yes.

Q. In other words, that you were going there really for the sole and limited purpose of acting on their behalf in the acquisition of the station in Milwaukee? A. Well, that was the whole idea of getting that option that I could assign.

Q. Did he say that to you on the phone? A. I don't know. For them, sure. That was the only reason they wanted me to go to Milwaukee.

(36) Q. Do you know why they selected you? A. Well, unless it was just maybe a country boy going to Milwaukee. It would probably look better than a city slicker.

Q. Did anybody say that to you? A. No, sir. That's my opinion. That's why we country boys are chosen.

Q. You had never done any such thing as this for CBS before, had you? A. No, sir.

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Q. Then you came up to this meeting in New York? A. That's right.

(37) Q. You have told us some of the people who were there. Can you think of any others? A. I can't remember now. I can't remember whether the chief counsel was present or not, Brauner. I just couldn't remember.

Q. You knew all these people when you arrived? A. Oh, yes. I had known them for—most of them had been their research assistants, like Stanton, two salesmen.

Q. By the way, it was in this telephone call that you made the statement as to the time when you would arrive in New York? You didn't just arrive unexpectedly, did you? A. I don't remember, to be frank with you, whether I made a definite appointment to come up here for a particular date or whether I called later and said I'd be up there Monday. I just don't remember. It had to be at my convenience. I know that.

Q. You put yourself out a bit to hasten it, didn't you? A. Certainly.

Q. Why? A. I don't remember why. What do you want why?

Q. Just that. A. Well, you want to do a job, you do it or you don't. I (38) mean, I don't understand.

Q. All right, you have answered the question.

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Q. When you got up there, will you tell us what the conversation was, as best as you can recall? A. They had come to the decision, evidently, from what was said, that

they would like to buy a station, a UHF station in Milwaukee.

Q. Who said this. A. I frankly wouldn't know. I don't even know who the spokesman was.

Q. Go ahead. A. And that, as I remember it, it had finally come to where they thought that a station that I had never heard of called WOKY-TV was one that they would like to have me try to get an option on.

Q. Did they tell you they wanted you to get that? A. No, I don't believe so. I think I didn't go into why they chose Milwaukee or what.

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(41) Q. Did you ask or were you told how many there were in the Milwaukee area? A. I don't think so. I had been given the particular job of getting an option on WOKY.

Q. You were a management consultant and were pretty familiar with it, weren't you? A. The particular assignment that I was given was to see if we could get an option on WOKY-TV.

Q. Did you know, or were you told what other UHF stations there were in the Milwaukee area? A. There may have been a list of those other stations in Milwaukee at one stage. I don't know.

Q. Why would there have been such a list? A. I don't know.

Q. Why do you say that? A. You asked if I was told that there were other stations. I mean, there was no comparison. I was just given information on WOKY-TV.

Q. Was there any discussion about the Milwaukee situation? A. I don't remember anything at all except WOKY-TV. I asked who owned it.

Q. Were you told? (42) A. I don't know whether they knew then, but Bill Lodge later sent me information about it.

Q. That was because you asked who owned it? A. Certainly.

Q. Did Lodge send you the information or did he give it to you? A. He had a memorandum. I think he sent it over to the hotel before I left.

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(44) Q. What was the discussion? A. Along the line of explaining that they wished to buy a UHF station and that this seemed to be the location—that is, the area—and I don't know why.

Q. They didn't say why? A. No.

Q. You didn't ask why? A. No. My only interest was doing a particular mission that they wanted me to do.

Q. Is that all the discussion there was on whether you could go and get an option on WOKY? A. There may have been details about it. Bill Lodge would get me together whatever information he could on WOKY, which he sent me in a memorandum over to the hotel. And then I also asked if they would send me—yes, I remember this. I asked if they would send me a suggested option form contract, which was also sent me over to the hotel by Mr. Brauner. I frankly don't know whether he was in the room or not, but he sent it over to the hotel.

Q. Did you raise the questions about what other stations there were in case you couldn't get the option for WOKY and might try to get the option from some other station? (45) A. I don't remember that there was anything like that discussed. It was just WOKY. That was all we discussed. That was my job, to go out and get WOKY.

Q. When you arrived in Milwaukee, did you go there and not know what other stations there were in Milwaukee? A. I think on the plane I probably read the Television Digest Fact Book, which just gives a list of the stations, and who owned WOKY, and I found that that was probably what Bill Lodge had copied it from.

Q. Although you read that in the plane, at your meeting with these men who knew all about Milwaukee and who had the national network, you didn't ask them to fill you in

on any of the Milwaukee situation? A. It didn't matter. It was just a question of buying WOKY-TV.

Q. Did they mention a price to you? A. I can't remember. I don't think there was—they just said, "What do you think we could buy it for?"

Q. And what did you tell them? A. I had no idea.

Q. Did they give you any idea? A. (shaking head.)

Q. So that your mandate was to go out and get an option (46) at the lowest price you could get? A. I imagine that's it, or see at what price I might get the option. After all, when I found out what I could do, I—

Q. So that when you went out, you didn't know what they would be willing to buy it for? A. No.

Q. That is, CBS? A. No.

Q. And you didn't know what Bartell would want to get? A. It was exploratory at the start.

Q. So you were at CBS for about an hour? A. Well, I'd say an hour. It wasn't over an hour. I decided well, I'll undertake it and do the best I can.

Q. Did he tell you what they wanted the option to be for? A. Purchase.

Q. Of what? A. WOKY-TV.

Q. What part of WOKY-TV? Its license, its buildings or its equipment? A. The complete station operation.

Q. They wanted the whole business? (47) A. The whole station operation. When we buy a radio station or television station, we just buy everything.

Q Did you know, before you went to Milwaukee, whether Bartells owned the building in which their station was located? A. No.

Q. Or whether they were lessees? A. No.

Q. You didn't know whether you were going to buy a lease or buy real estate? A. That's right. You rarely do in starting a deal like that.

Q. You didn't try to find out before you went? A. After you get there, you do.

Q. You didn't know before you went? A. Well, it was not in any records particularly.

Q. And CBS didn't tell you whether they knew or not? A. Well, I doubt if it was in Lodge's memorandum.

Q. I am talking about the oral discussion. A. I don't remember. I think that just no one knew, frankly, because after all, the price was predicated on whether you own the property or lease it, so it takes care of itself.

(48) Q. How does it take care of itself? Can't there be a difference of opinion about the value of real estate? It might be a different problem than the value of a license. A. Wouldn't you pay more if you owned the property than if you leased it?

Q. Of course. Would you have a double problem if you had to buy the license and the real estate than if you just had to buy the license; and wouldn't you have a triple problem if you had to buy the license and the equipment and the building? Of course, all that would affect the price. A. Certainly. You would have all of it, whether you took the cash assets or whether you bought assets. In other words, you don't know what you start with.

Q. None of that was discussed at this meeting? A. I can't remember anything except what basis it would be bought for.

Q. Just how much you would buy, whatever it was? A. In my judgment what would be a good deal to get an option on that station.

Q. Whatever that— A. Left up to my judgment.

Q. So it was left to you to determine whether it included real estate, whether it included leasehold, whether (49) it included equipment? A. That's right.

Q. In addition to the license? A. That's right. Just to find out how it was operated and what it would include.

Q. And you, with all your experience in radio and television and knowing of these various elements in the transaction, didn't go into these elements with the CBS people

at that conversation? A. No. I just was going out there to find out. I doubt if they knew.

Q. Why did you undertake the assignment? A. Well, I thought it was rather a challenge to see if I could go out and buy a television station.

Q. Was there anything said about whether Bartells had indicated any intention of selling? A. I don't know. I doubt if they approached me.

Q. Nothing was said about that at the meeting? A. No.

Q. Was anything said as to whether the CBS people thought that Bartells were making or losing money? A. I don't think they knew.

Q. There was nothing said? ((50) A. No.

Q. You didn't ask? A. I think I just asked—he didn't know anything about it. Nobody seemed to know anything about the station at all.

Q. Nothing except that it was in existence? A. Certainly. They knew it was in existence and at what frequency it was operating.

Q. And that's all they knew about it, as far as what they said to you? A. As I remember it, it was an affiliate of one of the networks; I can't remember offhand, but I think it was.

Q. You knew that on your own; is that right? A. I think it was a part of the memorandum that I got out of it.

Q. It was an affiliate of some other network; is that right? A. I don't remember. I think it was. I can't remember when I got that.

Q. Was anything said about that at the meeting? A. No.

Q. Here were all these gentlemen meeting together with you, a substantial number of high executives of CBS. (51) A. Yes.

Q. And all they said to you was, in effect, "Mr. Holt, we'd like you to go to Milwaukee and get us an option to buy WOKY-TV." A. Yes.

Q. That's all they said? A. Certainly. "Just see what basis you can get it on."

If it was too much, they probably wouldn't have taken it. That was all; I can take it for granted.

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(53) Q. Why was it that you wanted an option and not an (54) agreement of sale? A. Well, I would think there would be two reasons. One would be that in a large corporation I would think that they—an option would have to be taken first to determine whether to buy. But the major reason would be that whether—I mean, the stage at which the purchase of UHF station by a network would be permitted by the FCC. As I remember it, the FCC regulations, they publish an order or intent, or something. You may know more about it than I do. At the end of a certain period, it is in effect.

Q. That is a statement that is very flattering to me. A. At the end of a certain period it is in effect, but as I remember it, it had been published, but it wasn't actually in effect.

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(56) Q. Let me just continue to ask, didn't you know at the time you went to Milwaukee that there was another UHF station in Milwaukee named WCAN-TV? A. I presume that it was listed and I can't remember any information about it. I presume it was listed as one of the stations. There was, as I remember it now, there was a VHF station —there were three stations listed, and I presume the other one was a UHF station.

Q. Didn't you know that the other UHF station was (57) an affiliate of CBS? A. Frankly, I don't remember that I did. It didn't matter to me.

Q. I didn't ask you whether it mattered. A. I frankly don't remember that I did at the time.

Q. Didn't you know that when you went to Milwaukee to acquire an option on one UHF station for CBS, at that

very time CBS had an affiliation agreement and arrangement with another, and the only other UHF station in Milwaukee? A. I don't remember that I was conscious of that fact, no.

Q. Hadn't they discussed that at all? A. I don't remember that they did because we were talking about WOKY-TV and that was my mission.

Q. You didn't care why they would have the notion that they wanted it regardless of any other circumstances? A. No, I had my mission.

Q. Was anything said about your compensation for going on this narrow mission? A. Frankly, I volunteered that it depended on what I could do.

Q. Tell us what the discussion was and with whom? A. Well, to be very frank with you, all that I said was just for looking into it, that I would take a color television (58) set for my wife and I'd pay my expenses.

Q. You would pay your own expenses? A. No, that they would pay my own expenses.

Q. Why would you do all that for CBS? A. Well, if anything came of it, which did, I could get something out of it.

Q. Suppose nothing came of it? A. Well, I get a color television set and my expenses paid.

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(61) Q. So that when you went over to Milwaukee, you didn't know what your compensation would be? (62) A. No. I was perfectly willing to go on the basis that gentlemen doing business, and that it would be a fair compensation.

Q. And you never acted as a broker for them before, or as an agent? A. Not for them, no.

Q. You left it entirely to them? A. Well, I left it—I said, "We won't have any trouble agreeing to what's a fair fee."

Q. Why did you say that? A. Just the way I've always done business.

Q. While you were in your hotel room, or at any rate while you were in New York, you received a memorandum from Mr. Lodge; is that right? A. (nodding head.)

Q. In that memorandum he gave you some information about the Milwaukee situation? A. That's right, about the WOKY situation.

Q. You also got the form of assignment contract? A. That's right.

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(64) Q. I show you the document you have just produced, marked Plaintiff's Exhibit 1, which is obviously a letter addressed to you, signed by Mr. Lodge, dated July 26, 1954, and ask you why the top of this page has been torn off. (65) A. Frankly, I didn't want to leave a CBS letterhead lying around a hotel. I didn't want them to know that I was in there for CBS.

Q. Around which hotel? A. Where I stayed in Milwaukee.

Q. You mean in Milwaukee? A. Certainly.

Q. You tore it off at that time? A. I tore it off when I got there, I guess.

Q. Had anything been said to you about the necessity for secrecy with regard to CBS having any interest in your trip? A. I don't think they wanted NBC to know it.

Q. Was anything said about it? A. Well, I think that I can't remember specifically, but certainly they didn't want NBC to know it. I got that impression.

Q. Why is it just NBC? How about Poller? A. Who is he?

Q. The man who owned the other UHF station in Milwaukee. A. I don't know anything about that.

Q. Wasn't it inherent in the fact that they weren't using their own personnel and were using you that they wanted it to (66) be kept a secret, generally? A. Well, I presume so. I think any time you go to buy a company, you don't go in there and say, "I represent so and so."

Q. Why did you specify NBC as the people that they would want to keep the secret from? A. Well, I think it's generally conceded that they're pretty competitive.

Q. Who is pretty competitive? A. NBC and CBS.

Q. How about ABC? Aren't they competitive with CBS? A. I presume so.

Q. Why didn't you specify them? A. I just think of NBC as the chief competitor, I suppose.

Q. You don't think of ABC as a competitor of CBS? A. Well, they weren't when I was in business. Everybody was a competitor, but these two were the two competitors.

Q. You didn't think of Dumont as a competitor with CBS, did you? A. No.

Q. And you didn't think of any of the local Milwaukee stations as competitors of CBS, did you? A. No, I don't think so.

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(68) Q. Who decided on the $1000 as the option price? A. I did.

Q. You did? A. I did. I put some money in the bank out there in my own name.

Q. Your own money? A. Yes.

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(71) Q. Were there any discussions about the price? A. Oh, frankly I tried to do what I thought was the fair thing. I said, "Would you be interested in $50,000 more than (72) you have actually got in the station?

Q. What did they say? A. Well, they were very much interested.

Q. That is the price at which you got the option? A. That's the way it started.

Q. How did it end? A. Beg pardon?

Q. How did it end? A. Well, subject to adjustments. I said, "What does your transmitter cost?"

He said, "X number of dollars."

I said, "All right, we'll put that down. If it shows that it's less than that, we will deduct it."

I said, "What did your other things cost you?"

"X number of dollars."

I said, "We will put that down. If it's less, we will deduct that."

And it went on, and so forth. In the contract we said the price shall be, I believe—it all added up to—I believe it was $335,000.

(74) Q. It was on the basis of the $50,000 additional to their investment that the deal was finally closed; wasn't it? A. I would think so because, of course, once I turned the option over to CBS, I don't know what was paid.

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(81) Q. How did you know that they would approve of the price that included all of the investment of the Bartells plus $50,000? A. I think when I got to the $335,000 price, since it was purely an option, I can't remember at what stage CBS agreed to $335,000, that it was a fair figure, whether it was when I brought the option back and put it on Stanton's desk or what, because as far as I was concerned, I was there to see what could be done, and if they didn't exercise the option, they just didn't exercise it. I can't remember that we had a definite figure in our mind at any stage. I just got what I thought was a fair proposition.

(82) Q. So that when you brought the option back to New York, CBS didn't know until you gave them the option agreement what the price was fixed at in the option? A. They didn't know any of the terms of it, and I can't remember whether they knew the price or not because when I laid it on Stanton's desk that Saturday morning, I just briefly outlined the terms, and I said, "I'm leaving it with you and decide to do whatever you want to do."

Q. Did you communicate with CBS by telephone while you were in Milwaukee? A. I'm trying to think whether I did or not. I'm not sure that I did. I don't remember really. It wasn't necessary. After all, it was an option

and it wasn't necessary. They just said, "Go out and see what you can do and we'll decide if it's a good deal." I couldn't lose but $1000, and I'm sure they would have replaced that for me.

Q. You had no doubt about that? A. I think they would have replaced the option money, although it was not in the agreement. There was not any agreement particularly, but I guess that was part of my expense.

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(86) Q. What was your next connection with the transaction? A. Extension of the option.

Q. Tell us how that came about. A. Well, I forget exactly when the option was—had to be extended, but it was $4,000 that had to be paid; and as I remember it, I got a letter from Stanton saying, in words to this effect, "We're enclosing the check for $4,000 and wish the option to be extended," which I immediately sent Bartell a check for $4,000, and he extended the option (87) period.

Q. What was your next connection with the transaction? A. I think I was just out of it from then on, except the night that I was—I was through except the night that Jack Van Volkenburg, or somebody, called me one night and said, "We're going to exercise the option."

So I called Bartell, and I think he was shocked that it was CBS. He called me about it at 11:00 o'clock. "Did I understand what you said?"

And I said, "Certainly."

Q. I didn't catch you. A. CBS called me and said, "We're going to exercise the option." And then they said, "Will you notify Bartell?"

So I called Lee Bartell at his home from my home and told him that I had turned the option over to CBS. And he was so flabbergasted, as we call it down south, that—

Q. And up here, too. A. And about twenty minutes later, he called me back and said, "You have knocked me—" I don't know what his expression was, but he said,

"Did I hear you right? Have you turned that over to CBS?"

I said, "Yes."

And he says, "Well, Jerry Bartell, our president, is in (88) New York right now at such and such a hotel."

So I called back—I think it was Van Volkenburg that called me—and I said, "I have notified them and their president is in New York, and if you will contact him at such and such a hotel, you folks can take it from here."

And that was it.

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Q. Mr. Holt, did you know at any time while you were negotiating on behalf of CBS with Bartells that Mr. Poller had offered CBS to sell his UHF station in Milwaukee to them? A. I had no knowledge of anything about his—

Q. They didn't tell you anything about that? A. Oh, no.

Q. So when you went to negotiate for the one station, you did not know that there was a possibility or prospect of buying the other? A. (shaking head).

Mr. Freedman: The witness answers in the (89) negative.

The Witness: I'm sorry. I said, "No." But not loudly.

Q. Do you know now, or have you learned at any time, any difference in the value of WOKY-TV, as distinguished from the WCAN TV station? A. No.

Q. Do you know anything about the WCAN TV station? A. I'm afraid not.

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(99) Q. Other than your compensation for acting for CBS, did you have any personal interest in this option? A. I advanced the original $1000 out of my own funds.

Q. That was something— A. Paid my own expenses. But I was reimbursed.

Q. Those were matters that CBS owed you for? A. Yes.

Q. But you had no interest in the ownership of that option at any time, did you? A. Well—

Mr. Doskow: I object to that as calling for a legal conclusion. That is a legal question on which there is documentary—

(100) Mr. Freedman: I will reframe the question. Since some of the documents are altered in their effect by the arrangements between the parties, it is not quite right to say that this is a question which is determined by the documents.

Q. When you got the option in your name, you got it for CBS and not for yourself; right? A. I'll put it this way: The option was assignable but in my name, and I naturally was going to give CBS the assignment as far as I was concerned.

Q. You were acting as their agent as far as you were concerned? A. They asked me to go out there and get the option.

Q. You were acting as their agent?

Mr. Doskow: That question is a legal question which, I think, is unfair to ask this witness to answer. He has given you the facts.

A. They asked me to go out there.

Q. And you were doing it for them? A. I don't know what the legal definition was. They asked me to go out there.

Q. You were doing it for them? A. I was going to turn the assignment over to them.

(101) Q. You were doing it entirely on their behalf; is that correct? A. I went out there at their request.

Q. When you got the document running in your name, you were holding it on their behalf, weren't you? A. I offered it to CBS.

Q. Suppose they had turned you down. Would you still have something of your own? A. I would have owned it.

Q. Did you contemplate that you would own anything of your own? A. Beg pardon?

Q. Did you contemplate that you would own anything of your own? A. That would have been a decision if they turned down the offer that I could have had it in my name.

Q. Did you contemplate any such ownership on your part? A. I didn't plan it.

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(102) Q. • • • Did you intend at that time to have any interest in this option except that you acquired it on behalf of CBS? A. The initiative was theirs, absolutely.

Q. I didn't ask you whose initiative it was. I asked you whether you had any intention of retaining any interest in it. A. It was not my purpose in going out there to get it for myself.

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(103) Q. How did you come to ask for the extension of the option? Did someone ask you to ask for the extension? A. Dr. Stanton wrote me a letter for that.

Q. And asked you to do that? A. That's right; and sent me a check for $4,000.

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(105) Q. You produced a letter dated July 31st, 1954, from Winifred Williams, secretary, on the stationery of Frank Stanton, saying that Dr. Stanton had asked to remind you, "To give him a figure for the total amount of your expenses as 'Stonewall Jackson'."

What does "Stonewall Jackson" refer to? A. Just a code name I used.

Q. It was your idea? A. Yes.

Q. Tell us about why you suggested it and when you suggested it. A. Well, I guess just coming from the south of the Mason & Dixon line, I just thought that Stonewall Jackson was a good name.

Q. What is Stonewall Jackson supposed to signify in this correspondence? (105) A. Just the Milwaukee project.

Q. The purpose being to keep it secret; is that it? A. Yes.

Q. You suggested it? A. I suggested the name.

Q. Who suggested that it be kept secret that caused you to suggest the name? A. It was discussed from the very beginning it should be secret.

Q. I think you said you had a document of August, and I have one here that you have handed me of August 11th. A. Yes.

Q. Do you have anything earlier than that in August? A. I don't think so.

Mr. Doskow: You have your statement.

Q. Didn't you submit statements with the amount of your expenses for which you got this letter of August 11th? A. Yes. August 7th, yes. This is August 14th (handing to Mr. Freedman).

Q. You have produced two statements dated August 7th, signed by you, addressed to Columbia Broadcasting for expenses, and additional expenses on the Stonewall Jackson project; is that correct? (105) A. Yes.

Q. And I presume then that these various names that are set out in the expense statements, such as plane fare for Seven Pines, via Fredericksburg and Chancellorsville were part of the same general nomenclature of secrecy? A. Certainly.

Q. All of them being your idea? A. Yes, sir.

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(108) Q. You have produced a letter of September 27, 1954. A. Did that not go with the other letter?

Q. Yes, from Stanton to you. A. Yes.

Q. Which is a kind of letter agreement, because at the bottom it is accepted and agreed to by you. Right? A. Yes.

Q. In that letter, if you will look at it, in the(109) third paragraph, the last sentence reads, "You have advised us

that you are willing to extend the option contained in the above mentioned option agreement and to assign such option agreement to us on the following conditions."

Weren't you always willing to extend the option and to assign it to CBS any time they asked for it? A. From the very beginning of the agreement.

Q. If you will turn to the last page of that very same agreement, you will find the last sentence in the next to the last paragraph, "In the event that we do not so request . . ." namely, an assignment ". . . you may exercise such option yourself, transfer it to a third party, permit it to lapse or take any other action as you may deem advisable with respect thereto."

Why does this letter say that you have made that a condition on which you would be willing to extend the option and sign the option agreement to CBS? Do you know? A. No.

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(110) Q. Did you ever demand such a condition from them? A. I don't think that was ever discussed, particularly. I think it was taken for granted that the option was in my name, and if they didn't take it, I probably would have the right to do what I wanted to do.

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(118) Q. Did you say anything when you were at Bartell negotiating with them, did you tell them anything about whom (119) you were there for or on whose behalf you were dealing? A. No, sir.

Q. You just allowed them to assume you were there on your own behalf? A. It wasn't—as long as I paid the money and they signed the contract, it didn't matter who I represented, myself or any one else.

Q. You said nothing whatsoever? A. No.

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(122) Q. Is there any practice in the industry that you know of as to what happens regularly or normally if a

network buys a local station in an area, what happens with the affiliation or the affiliated station in the same network? Do they usually maintain the same affiliation? A. I would take it for granted that they feed their own programs to their own stations.

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(123) Q. I would like to come back with you to the meeting in New York when you first went there and met with Dr. Stanton, and I think you said Mr. Brauner was there.

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(125) Q. Can you try to recall for us, with that small group seated around the table, what it was that they said to you and you to them? A. After three or four years, I'd be—I don't believe I'm going to be able to recall particularly. I can give you the gist, which was that they wanted to be in a position to buy a UHF station. I'm trying to give you the gist; that they—I don't know how this Milwaukee part was brought in; and I can't remember exactly who said it, but one person said, "It looks like WOKY-TV is the one we'd like to get."

I just remember just generally those three things said. From then on it was a matter of discussion of whether I could undertake the strategy, and so forth.

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(130) Q. Did anybody at CBS ever tell you at any time, from the period when you first got into this transaction until you completed it, that they intended to use other equipment in addition to what was at WOKY-TV? A. No, sir.

Q. Or that they might use additional equipment beyond that which was at WOKY-TV? (131) A. When I turned the option over there, I doubt if they had even been out there.

Q. I didn't hear you. A. I said when I delivered my option to them, I doubt if they had ever seen the equipment.

Q. You doubt whether who had seen it? A. CBS.

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(133) Q. Is a network affiliation by a local station ordinarily a thing of value? A. I would say yes, depending on the market and a lot of other things, but there is no way of saying—in radio it's not any more. They are cancelling them. So I just don't know how it is.

Q. And with TV? A. I would say offhand it would be of value.

Q. In TV, at the time you were in Milwaukee, was a network affiliation a valuable thing to a local station? A. I would think so. We considered it such.

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WILLIAM B. LODGE
Vice President
in charge of Engineering

July 26, 1954

Dear Thad:

The purpose of this letter is to give you some background material on Milwaukee television, which is possibly easier for me to obtain here in the shop than it would be for you while you are away from your office.

First, the UHF channel situation in Milwaukee is as follows:

Channel	Call Letters	Operating Status
19	WOKY-TV	18.2 kw - 410' aat STA
25	WCAN-TV	212 kw - 420' aat STA
31	Not in use	WMIL-TV CP 8/19/53; CP cancelled 12/5/53. North Shore Broadcasting application 12/26/53; dismissed 5/27/54.

Second, four VHF channels (one educational) are assigned to the Milwaukee area as follows:

4	WTMJ-TV	100 kw - 910' o.a.
6 (Whitefish Bay)	(Hearing)	
10	(State of Wisconsin)	58 kw - 416' APP.
	(Bd. of Education)	29 kw - 416' APP.
12	WTVW	251 kw - 1075' CP.

WTVW is, I understand, in the process of constructing the station authorized on Channel 12 — hopes to go on the air in October. The applicants in hearing on Channel 6 are the Hearst Corporation (WISN), Independent Television, Inc., and Cream City Broadcasting Company (WMIL-TV). Two applications are pending for the educational channel, No. 10.

With regard to rates, the June 10, 1954 Standard Rate and Data Network Rate Card lists WTMJ (on NBC) /Must-Buy Basic/ at $1400 per nighttime Class A hour. The same issue of SRDS lists WCAN (on CBS Television) /Basic Optional/ at $675 per nighttime Class A hour. Also listed in the same issue is WOKY-TV (ABC) at $300 per nighttime Class A hour.

Deposition Exhibit F-1, attached to Holt Deposition

The July 19 issue of Broadcasting/Telecasting indicates claimed TV homes for the Milwaukee stations as follows:

WTMJ	679,256
WCAN-TV	365,790
WOKY-TV	322,981

Both VHF and UHF claims are probably inflated. Circulation estimates by the CBS Television Engineering Department indicate a potential (at 100% ownership and conversion) of approximately 420,000 TV homes for a UHF station in Milwaukee. After deducting areas better-served by WEMB-TV, incidentally, the VHF potential is about 563,000. Which means WTMJ-TV is probably claiming duplicated homes, as well as some distant fringe areas.

The April UHF-VHF Reception Survey by ARB in Milwaukee indicated 49.9% of all homes had UHF reception; that 57.4% of TV homes had UHF reception; and that 86.9% of all homes had television receivers.

According to the current Godel Television Factbook, station opening dates were as follows:

WTMJ (4)	December 3, 1947
WOKY-TV (19)	September 25, 1953
WCAN-TV (25)	September 5, 1953

Also, according to the current Factbook, ownership of WOKY-TV is as follows: Gerald A. Bartell, pres., 16.667%; Melvin M. Bartell, v.p., .4%; Lee B. Bartell, secy.-treas., 41.067%; David Bartell, 41.866%.

WOKY-TV is affiliated with ABC and Du Mont. Sales representative is Hadley-Reed Television, Inc. Its AM affiliate is WOKY, 1 kw, 920 kc. WOKY is also an ABC affiliate.

Key operating personnel for WOKY-TV are:

Lee B. Bartell, General Manager
Zinn Arthur, Television Director
Sheldon Kaplan, Program Manager
Ralph E. Evans, Chief Engineer

The studio is located at 704 W. Wisconsin Avenue; the transmitter at 5401 W. Burton Drive; the telephone number is Broadway 1-8480.

Our records do not indicate any increase in power since the original authorization of 18.2 kw ERP (this means a 1 kw transmitter) with an antenna 410' above average terrain. We have no information as to cameras, studios, offices, transmitter or other facilities.

Very truly yours,

William B. Lodge

Mr. Thad Holt

Deposition Exhibit P-1, attached to Holt Deposition

DEPOSITION OF FRANK STANTON

(2) FRANK STANTON, being duly sworn by the Notary Public, testified as follows:

DIRECT EXAMINATION

By Mr. Freedman:

(3) Do you know of a CBS-TV, Inc., a corporation? A. I think at one time we formed such a corporation, but it isn't active.

Q. Can you tell us the reason why you ceased having the CBS-TV, Inc., as an active entity? A. To the best of my knowledge, it was never active in the sense that the CBS Television Network or the CBS Television Division was active.

Q. Were you President of CBS, Inc., when CBS-TV, Inc., was created? A. I don't know.

(4) Q. Were you President of CBS, Inc., or in any other way connected with CBS, Inc., when CBS-TV, Inc., was determined should be a dormant corporation and not active at all? A. I don't know. I'd have to look that up.

Q. You don't recall having participated in any decision that it should no longer continue to be as active as it had theretofore been?

Mr. Doskow: I object to the form of that question as assuming facts which the witness has not stated.

Mr. Freedman: I said, "Do you recall."

Mr. Doskow: But your question assumed that it had at one time been active, which the witness did not say.

Q. Was it always inactive? A. Let me answer your question this way: I don't know that it was ever active.

Q. You don't know whether it was or whether it was not? A. I know it was not.

Q. You know it never was active? A. That's right.

Q. Do you know why it was created? (5) A. I suspect just to protect the name.

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(6) Q. Then I come back to the question that I started to ask a moment ago, and we got off the track on the abbreviation of some of these names. You had in existence a corporation known as CBS Television, Inc., and I believe you said to us that it was never really active and that it probably was created and used or allowed to remain unused really in order to protect that name.

Now, I ask you this question: Whether the establishment of your CBS Television Division was considered by you inadequate to protect the name of CBS Television? A. I don't want to seem to be difficult here, but first I'm not sure that there was or is a corporation CBS Television, Inc. There may have been or—well, I just don't know. There may have been a CBS-TV, Inc. Again, I'd have to check the legal department to find out the answer to that.

(7) But in June, I believe, of 1951, we standardized on the label of CBS Television Division for all operations in the broadcasting part of CBS, Inc., having to do with television, and at that same time established the name of CBS Radio Division for everything having to do with radio broadcasting. The reason that wasn't done earlier is simply the history of television. It wasn't important enough in the scheme of things to make that distinction earlier. We never operated our television operations under a corporate label of either CBS-TV, Inc., or CBS Television, Inc.

Q. So that even if—which you are not sure of and don't know, really, as you have said—even if there were in existence a CBS or Columbia Broadcasting-TV or Television, Inc., all of the operation of the television business in so far as it was separated from the radio business, at any time would have been in the division and not in the corporation. A. With one exception, and that is that there

was and still is a unit called CBS Television Film Sales, Inc., which is a wholly owned subsidiary.

Q. What is its business? A. Handling of syndicated film. It is largely a sales organization, although it does produce or have produced for it certain film products.

(8) Q. To whom does it make the sales by and large; to CBS or to others? A. Basically to others. Largely to advertisers and to independently owned stations.

Q. When it sells to advertisers, do the advertisers, do the advertisers then have it played on CBS programs? A. I don't think your question is clear, but if you mean by "programs" on CBS Television stations—

Q. Yes. A. Not necessarily. There are programs that CBS Television Film Sales, Inc., sells which are on other networks and on other stations.

Q. So that—on yours and on others? A. That is correct.

Q. Does CBS-TV—and when I say "TV" I don't want to confuse you. I know you have made a point of the non-abbreviation as distinguished from the abbreviation in different cases, but I'm going to discriminate in the use of them for facility and for the reporter, too, I think.

In the operation of the CBS-TV Sales, Inc., does that corporation have its own officers? A. Well—I beg your pardon. Are you talking now about the film?

(9) Q. Yes. A. Well, that does.

Q. Have I got its name wrong? A. CBS Television Film Sales, Inc.

Q. Does that have its own separate officers? A. It does.

Q. Are any of them also officers of the parent corporation? A. I believe some, but we'd have to check that to be absolutely sure.

Q. Are some or any of the employees common to the parent and the subsidiary corporations? A. Yes.

Q. Is their office in the same building? A. I'm not sure that it is now. It was at one time, but I don't believe it is now. I believe it's out of this building.

Q. Does it have the same Board of Directors or a separate Board? A. It has a separate Board.

Q. Are any of its directors the same persons as those who are directors of the parent corporation? A. I believe there is one officer of that subsidiary who is also an officer of CBS, Inc., and I believe he is a (10) director of both corporations.

Q. What is his name? A. Merle S. Jones.

Q. Are you an officer of this subsidiary corporation? A. I am not, to the best of my knowledge.

Q. Do you have anything to say in its policy or make any decisions in regard to its affairs? A. I do.

Q. Even though you are neither an officer nor a director? A. That's right. It's a 100 per cent subsidiary.

Q. In that regard, I presume your activities are quite similar—I don't mean the details of the activity, but the nature of your authority and of your participation is quite similar to what it is in CBS Television Division. A. Authority, but not details of operation.

Q. You don't get in as deeply into the details; is that it? A. That is correct.

Q. In the television division. A. No, in the film sales subsidiary.

Q. I see. So that you get more deeply into the television division than you do into the film sales (11) subsidiary corporation? A. That is correct.

Q. Since you mentioned it, will you tell us why, on March 11th of this year, you split CBS Television Division into two divisions, one network and the other stations? (12) A. The simplest way to answer that question, I believe, would be to read from a memorandum that went to the organization.

Q. Do you have it here? A. It will be in here in just a second.

This is a memorandum dated March 11th, to the CBS (13) Television organization, the officers of CBS, and the operating divisions.

Q. I would say this to you, Dr. Stanton: If that is a detailed memorandum, I don't think it is necessary for you to read it to us. I just would want to get from you— A. I think we will save time if I read it.

"In 1951 when we completed the separation of our radio and television broadcasting activities, the CBS Television Division operated two wholly-owned stations, New York and Los Angeles. The CBS Television Network had gross time billings at an annual rate of $42½ million.

"The CBS Television Network's gross billings for 1957 were approximately $240 million. The division now operates six company-owned stations, and has an application pending before the FCC for the purchase of WCAU-TV, Philadelphia. The other major units in the CBS Television Division today are CBS Television Spot Sales, CBS Television Film Sales, Inc. and Terrytoons. Some idea of the importance of these non-network units may be gained from the fact that they account for approximately half of the profits of the Division.

"Because of the growth, size and complexity of the (14) Television Division, the time has come to divide it along functional lines into two new separate operating divisions: the CBS Television Network and the CBS Television Stations."

Q. Does the network, the television network division, have officers separate from the television stations division? A. Yes. There is no overlap at all.

Q. Who is the president now of the television network division? A. Louis G. Cowan.

Q. Is there a vice president? A. There are a number of vice presidents.

Q. Of the division? A. Yes.

Q. Do you know the names of some of them? A. I do.

Q. Will you tell us? A. The Executive Vice President is Hubbell Robinson, Jr.

The Vice President in charge of sales is William Hylan.

The Vice President in charge of network programs is Harry Ommerle.

The Vice President in charge of network programs, New (15) York, is Mike Dann.

The Vice President of Network programs, Hollywood, is William Dozier.

The Vice President in charge of affiliate relations and engineering is William B. Lodge.

The Vice President in charge of operations is E. L. Saxe.

There are a number more if you want them.

Q. I think that's enough for the moment. Who is the president of the television stations division? A. Merle S. Jones.

Q. Who are the vice presidents of the television stations division? A. Craig Lawrence is one of the vice presidents.

This particular division is now in the process of setting up its table of organization, and I am not familiar with the other officers at this moment.

Q. For all intents and purposes, your CBS Television Division, prior to March 11, 1958, was operated and conducted in every way as if it were a wholly-owned subsidiary of CBS, Inc.?

Mr. Doskow: I object to that question. I instruct the witness not to answer it.

Mr. Freedman: I would like to note on the (16) record now that I call this witness as of cross-examination.

Q. Prior to March 11, 1958, when you split the television division, as you have just described to us, will you describe to us the general manner in which the television division was operated by its officers in relation to Columbia Broadcasting System, Inc.? A. Well, this was operated along customary divisional lines. It had its own complement of officers and operating personnel. It was housed—its headquarters were at 485 Madison, but it had offices in

many other locations, both in the city and outside of this city.

Q. Were any of its officers separate from the officers of Columbia Broadcasting System, Inc.? A. Yes.

Q. Did it have its own bank accounts? A. This is a detail that I'm not familiar with.

Q. Do you know whether any of its officers were authorized to draw checks? A. Yes.

Q. But you don't know whether it was on their own bank account—that is, the bank account account of the divisions—or of the parent corporation? (17) A. I rather imagine for payroll and accounting purposes they had separate accounts, but I'd have to get that information for you from the treasurer.

Q. Do you know whether they made contracts in their own name? A. Contracts in the name of the division as a division of CBS, Inc., yes.

Q. And contracts were signed on behalf of the television division as a division of CBS? A. Yes.

Q. The officers of the division had the same designations as are customary in corporate entities, like President, Vice President, Secretary, and so on? A. They did.

Q. Did they have a separate Board of the television division prior to the split in March of 1958? A. They did not.

Q. There was no Board of Directors. Who acted as the Board of Directors for the television division? A. This was not a corporation. This was a division, so it had no Board of Directors.

Q. It didn't file any separate income tax returns? A. No, because it wasn't a corporate entity. It was an (18) operating division.

Q. Did it have employees who were employed separately by the television division as its employees? A. Yes, it had a complement of full time employees that worked exclusively for the division.

Q. Were they listed on governmental reports as employees of the television division? A. That is a detail I am not familiar with.

Q. Were there any separate pension plans that related to the television division as distinguished from the Columbia Broadcasting System, Inc.? A. Not to my knowledge.

Q. Were there any separate Union contracts with the television division as distinguished from the Columbia Broadcasting System, Inc.? A. I don't know.

Q. I assume that since you don't know about pension plans, you would also not know whether there were any differences or distinctions in employee rights in the way of insurance or fringe benefits of any kind that related to the television division as distinguished from the Columbia Broadcasting System, Inc. A. I would be surprised if there were any differences, but (19) I'm not absolutely sure.

Q. Whether there were or were not any differences, would the employees and the officials of the television division be kept as a separate unit in the relation to those rights from those who were in the parent corporation directly? In other words, were they usually considered and treated as a separate unit for purposes of your internal operations? A. Excuse me. I think the way you rephrased that is different than the way you asked that originally. First, let me answer what I thought was your second question affirmatively.

Q. Now that I don't understand your answer— A. All I am saying is that they were treated as an operating division separate from the rest of the organization, yes.

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(23) Q. Did you ever have occasion to learn from any of your associates anything regarding the nature of Mr. Poller's abilities as a station operator? A. Indirectly at the time of his affiliation, I recall van Volkenburg talking about Poller's operation in Milwaukee.

Q. Do you know what he told you? A. At the time, he, van Volkenburg, said that he thought that Poller was a very promotion-minded, sales-minded, aggressive station operator.

Q. By "station operator," are you referring to a TV station? A. Yes, because that was the problem under consideration.

Q. Do you know also what any of your associates at CBS thought of Mr. Poller's abilities in the new UHF field? A. Well, he was operating in UHF at the time we made the affiliation, so that what I have just said bears on his operation as a UHF manager.

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(24) Q. Did you know anything about the nature of the operation of the WOKY television station in Milwaukee shortly before your meeting with Mr. Holt? A. Only in a very general sense that the station was on the air and from external indices, wasn't doing very well.

Q. That is WOKY wasn't doing very well? A. That is right.

Q. Did you have any general knowledge as to whether (25) WCAN-TV which was Mr. Poller's station, was doing well or was not doing well? A. We had the promotion that Mr. Poller submitted from time to time. We had certain information in terms of audience ratings. I know nothing about his financial status.

Q. Did you know whether his station was doing well or not? A. In terms of profit, I did not. In terms of audience ratings, I knew what the facts were as they were reported by audience reporting services.

Q. What did that show? A. Well, there were only two stations that really counted in the market, and he was number 2.

Q. You mean that WOKY was doing better than WCAN? A. No, WTMJ was doing substantially better than WCAN-TV. WOKY or WOKY-TV—I don't know what the call was—was a poor 3rd.

Q. Now, then, will you tell us why it is that you determined you would undertake to enter the field and acquire a UHF station in Milwaukee? A. Well, under the FCC regulations, as proposed, we were to be allowed to own five VHF stations and two UHF stations. Milwaukee looked to me as an attractive market to own a UHF (26). station there. Once that determination was made, we set about the acquisition of WOKY.

Q. Why did you determine to set about the acquisition of WOKY rather than some other station in Milwaukee? A. Well, there was only one other station that I think that we could consider. That was WCAN-TV.

Q. Why didn't you consider that favorably? A. Basically because it was reported to be priced at a very high figure, and because it would be difficult, I think, to deal with an affiliate in such a situation.

Q. How had it been reported to you that it had been priced at a very high figure? A. Through trade sources.

Q. Can you tell us more definitely? A. I cannot.

Q. Don't you know? A. I don't recall.

Q. Do you have any memoranda that would refresh your recollection? A. Not to my knowledge, no.

Q. Because of what essentially must have been second-hand, hearsay information that had been reported to you—was it? (27) A. It certainly was second-hand, and hearsay.

Q. Because of that, you, therefore, never undertook to test it by approaching WCAN-TV to ascertain whether it could be acquired at something other than a very high figure that had been reported to you? A. Well, when you hear from a number of different sources that a man has a high figure on his property, it doesn't make much sense to go directly and start negotiating with him when you can buy something else, or at least when you think you can buy something else at a lower price.

Q. What made you think you could buy WOKY at a lower price? A. Just in terms of what the station was doing in the market.

Q. Well, there, too, you didn't know their financial figures, did you? A. No, but I knew their performance figures in terms of audience circulation.

Q. It was obvious to you that they couldn't have been doing very well? A. Financially, that is correct.

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(31) Q. Now then, you know, of course, that you had an affiliation agreement with WCAN-TV. A. I certainly do.

Q. As a result of that, your people and the operators of WCAN-TV were often in communication with each other; were they not? A. Yes. This is the normal relationship that we have.

Q. And in the normal relationship, you would be in frequent touch with each other from time to time? A. That is correct.

Q. Why then, if you were interested in entering the field in Milwaukee, would you not at least have tested out your own affiliate, WCAN-TV, and inquired what they wanted to sell their station at, instead of relying on second-hand rumors and hearsay, and thereby excluding any discussion with them? They may have surprised you. A. It's possible.

Q. Why didn't you find out? A. Because I thought I had sufficient evidence to base (32) the conclusion that I had made.

Q. And it wasn't worth a question? A. Not in my opinion.

Q. Even though you spent how much for the acquisition of WCAN, and then the equipment, and so on of WCAN? A. That's a matter of record. I don't have that figure.

Q. Almost three-quarters of a million dollars. A. That's substantially less than the figure that was bandied about as what Mr. Poller wanted for his property, and we'd have had the expenditures on top of that particular figure because we wouldn't have been satisfied with the equipment just as we bought it.

Q. So that you embarked on the acquisition of a station at a cost which the record will show which, as I recall, was almost three-quarters of a million dollars, and you did not ask one question of the other possible seller because of what you had heard in the way of second-hand information, rumors and hearsay about their wanting a very large price? A. That's right.

Q. Even though this station operator was your affiliate and, therefore, in the normal course of affairs, would have been frequently in touch with you or other members of your organization from time to time? (33) A. Well, let's make it clear that frequent contact with the affiliate doesn't have anything to do with his financial status.

Q. O course not. A. It has nothing to do with his financial operation. It only has to do with the day-to-day operations of the network.

Q. But there were occasions where you would have been meeting where it would have been a simple thing to inquire if he was interested in selling his station? A. Let's make it perfectly clear that I had no such conversations. I did not inquire of Mr. Poller, nor did I cause any one else to inquire of Mr. Poller whether he would be interested in selling his property.

Q. That's right; even though, as I say, there were frequent occasions where either you or other members of your organization would be meeting with him in the ordinary course of your business and there would have been, therefore, the occasion when you could inquire. A. There was ample opportunity. I will be glad to admit to that.

Q. Now, didn't you say before to a Senate committee in 1954, in the way of testimony, that WCAN-TV was an excellent example of a UHF operation? (34) A. I want to look at the record before I answer that question.

Q. You don't recall that as you are sitting here now? A. I do not.

Q. Do you recall ever saying anything before any Senate committee with regard to Mr Poller or any of his operations? A. Yes, I think we pointed to the WCAN-TV

operation as an example of a UHF station that was competing against a VHF station. That was in the Potter hearings, I believe, in the summer of 1954. Perhaps—

The Witness: Was it '54?

Mr. Doskow: Yes.

Q. By "competing," did you mean successfully? A. As successfully as we thought a UHF could compete against a VHF. This was a very tough competitive situation in Milwaukee.

Q. Actually, you considered that Mr. Poller was doing a remarkably good job with UHF at that early stage of its existence, did you not? A. Yes, I thought that with the help of our schedule and the aggressive promotion, and so forth, that Mr. Poller was doing, he was doing a respectable job. He had tough (35) competition.

Q. So that you knew that his station was doing a "respectable job" in the face of tough competition, and you knew that the other station, WOKY, was not doing very well, and WCAN was your affiliate; and even though it was doing a respectable job, you nevertheless chose to buy the other station, which was not doing very well? A. Well, yes. But let's not be misled by those answers because TMJ was a giant and WCAN-TV was, by comparison, a very poor second.

We knew that when we went into the market, if we were successful in acquiring a UHF property in Milwaukee, that we would have a tremendous building job to do to ever try to make any UHF station fully competitive or as fully competitive as possible against a VHF station in Milwaukee.

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(36) Q. Therefore, within a short time thereafter, of your acquisition of WOKY-TV, one of two UHF stations in Milwaukee, there was only one broadcasting instead of two. A. Yes, but that had nothing to do with our decision to go into the market.

Q. Did it have anything to do with your acquisition of the equipment of WCAN-TV? A. I don't think I'm in a

position to answer that question. I don't know what went on in Mr. Poller's mind. He told us that he was going to continue to operate.

Q. I am not asking you what went on in his mind. I am asking you what the concrete facts are. A. He is the man who made the decision. I didn't make it.

Q. You made the decision to go into the Milwaukee market, didn't you? A. Right.

(37) Q. And you made the decision to acquire a UHF station in Milwaukee? A. Right.

Q. And you made the decision to acquire the one that was doing the least well; did you not? A. Well, now, when you say—what do you mean by that? That had nothing to do with going into the market.

Q. Will you answer the question? A. We made the choice to buy WOKY-TV.

Q. Right. And WOKY-TV was the one that was not doing as well as the other. A. That is correct.

Q. And then having made the decision to go into the market and to buy the station that was doing the least well of the two UHF stations, you then acquired the equipment of the other UHF station; did you not? A. We did.

Q. Now, then, as a result of that, you, on the signal or the channel of WOKY, or the former WOKY, were broadcasting, using the equipment of WCAN-TV; isn't that right? A. Yes, I think it is correct.

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(41) Q. Did you personally believe at the time that CBS acquired from him the equipment of WCAN-TV that he was really going to operate a television UHF station in Milwaukee? A. I certainly did. I took him at his word.

Q. You took him at his word and you expected that he was going to continue to operate? A. He told us he was going to do that.

Q. Did he volunteer that information to you or was he asked? A. I wasn't present at the negotiation. I think you should ask the man who was there.

Q. So that you don't know? A. I do not know.

Q. Why did you care? A. UHF was having a difficult time all over the country. We had been doing a number of things ourselves in an effort to encourage UHF. Our affiliation with Mr. Poller, to begin with, was partly that kind of a move. As a network (42) we were not interested in doing anything that would inhibit or cut back the operation of UHF.

Q. I suggest to you that if you were interested in having as much UHF done in Milwaukee as possible, the simplest thing would have been to buy the Bartells' station, including their equipment, and to have left Poller alone, and then you would have had one station, and the other station would have remained untouched. A. We didn't go after Mr. Poller to ask him to sell his equipment to us. He came to us for that purpose.

Q. Didn't you expect he would come to see you after you sent him the notice of termination of affiliation agreement? A. To offer his equipment to us?

Q. To offer everything he had to you. A. Absolutely not.

Q. You didn't expect it? A. I was the most surprised man in the world when I was told that he was offering his facilities to us.

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(43) Q. Suppose ABC was not available because it had an affiliation. Do you think that Mr. Poller could have been able to continue with all of his excellent equipment, with the studios that were then in process of being completed and so on, all of which was very expensive, as you well know, if he hadn't been able to get any affiliation, and you cancelled yours? A. This depends upon the energies and the abilities of the individual. I can't predict what he could have done or couldn't have done.

Q. You would have to admit, wouldn't you, that that (44) would have been a pretty uphill struggle? A. It would have been a tough fight.

Q. You already told us that UHF was having a very difficult time. A. That's right.

Q. And you were interested in promoting UHF, weren't you? A. Right.

Q. And interested as you were in promoting UHF, you cancelled your affiliation agreement with Poller, you didn't know whether he could get an affiliation with anybody else, and you bought all of his equipment, and yet you expected that it was just as likely that he would continue in business with a UHF station as it was that he would not? A. He told us he was going to.

Q. You believed that? A. I certainly did.

Q. And you considered it was likely that he would continue to operate and to broadcast after you had purchased his equipment? A. Yes.

Q. Even though he had no affiliation? A. Yes.

(45) Q. You consider an affiliation important to a local station? A. Yes.

Q. Do you think it is helpful to a station to have an affiliation with CBS or one of the other large networks? A. Yes.

Q. And UHF, at best, is a very difficult thing to be successful with; isn't it? A. Yes.

Q. And, therefore, it is all the more desirable to have this prop of the network affiliation; isn't it? A. Yes.

Q. And here you came to Milwaukee and you bought the WOKY UHF station, and then purchased the equipment of the better UHF station, and yet you expected now, without an affiliation, it would undertake to continue to broadcast? A. Yes.

Q. And that's because he told you so? A. That's right.

Q. And you put that in the agreement in which you agreed to buy his equipment, didn't you? A. Yes.

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(46) I know. You didn't participate in that aspect of the transaction. But I am asking you as the president (47) of the Company whether you didn't consider that it was an

important provision that should be in the agreement. A. I thought it was important to keep UHF going, certainly.

Q. You thought it was important to keep Poller's station going, too; didn' t you? A. Yes.

Q. Why? A. Because I thought it would help UHF.

Q. Not because you thought it would help Poller. You had no interest in him personally. A. Not in him personally, no.

Q. You did have an interest in the continuance of another UHF station in Milwaukee? A. That is correct.

Q. And that's why you wanted him to promise you that he would continue to operate that station? A. Well, I think we are repeating ourselves here. All I was interested in doing, looking back on it, was seeing that we didn't diminish the number of stations operating in the community.

(48) Q. Is that the only reason? A. It certainly wasn't for anything else I can think of it.

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(50) Q. You remember, I suppose, that the affiliation agreement that you entered into with WCAN had a different provision with regard to termination than the customary form of agreement. Do you recall that? A. Can you be more specific?

Q. Yes. That instead of running for two years with the usual period of notice of termination, this one provided for six months' termination. A. Right.

Q. Can you tell us why there was that difference in the provision in your agreement with WCAN with regard to the (51) termination notice required? A. Well, there probably were a number of reasons, but this was unchartered seas for us. This wasn't unique in the case of WCAN-TV. There were other 6-month cancellation provisions in other contracts. This was by way of telling Mr. Poller that this was a trial marriage, if you will. We were not sure that we would continue this affiliation. We were under considerable pressure from advertisers to allow the programs to go on on WTMJ-TV. When we decided to make the affiliation—

and I believe it was in the fall of '53—we weren't just sure enough of Mr. Poller and his operation. We weren't sure enough of what was going to happen in that particular market. We didn't know when other stations might be coming on the air.

Q. Was one of the considerations the possibility that you yourselves might want to go into Milwaukee with a UHF station of your own? A. At that time, the Commission's attitude hadn't crystallized, and we didn't know whether we were going to be allowed to own UHF stations or not. Prior to that time we had tried to determine that from the Commission without success. This was an undecided issue.

Q. But the matter had not been foreclosed at that time? (52) A. It had not been.

Q. Therefore, it was still something that was possible, although it had not yet been determined. A. That's correct.

Q. And you took that into consideration, too, did you not, when you made this provision that was relating to the termination notice? A. Not to my knowledge.

Q. That didn't enter into it at all? A. No. I remember van Volkenburg came up to see me and said that we'd had so much difficulty with the clearance problem on TMJ that he was prepared to recommend that we affiliate on a trial basis with WCAN-TV. You have to go back in history and realize that at that particular time in the development of television, we didn't know whether we could get along with a UHF station, whether it would be adequate in terms of its performance. This had nothing to do with Mr. Poller.

Q. This dealt with UHF, generally? A. That's right. So that we had held out as long as we could in an effort to live with a split relationship with TMJ. TMJ was a primary affiliate of NBC, although there had been a time earlier when it looked as though TMJ might change its affiliation and become a primary affiliate of (53) CBS Television. But we had lived with that dual relationship to the point where it was almost impossible, and van Volkenburg

recommended the change. But because it was a major step and because Milwaukee was an important market to us, he came up to see me about it, to discuss it with me. Ordinarily, moves of that kind aren't brought to my attention, but at that stage of television's development, that one was.

Q. So that would it be true then that in all other cases where you were making affiliation agreements with a UHF station, you would have made this limited provision with regard to notice of termination? A. I can't say whether it was true in all cases, because if you had a UHF affiliate on the market, such as Fort Wayne, where there is no VHF, the chances are that that 6-months clause was not in the contract, but I can't testify on that point.

Q. In the fall of '53, when you made this affiliation agreement with WCAN-TV, you did not have in mind at all the possibility even that you might want to acquire a UHF station in Milwaukee? A. To the best of my recollection, that was not discussed at any time surrounding the period when this affiliation arrangement was entered into with Mr. Poller. I remember (54) one thing that I told van Volkenburg at the time, and that was that he should be very explicit to Mr. Poller that this was a 6-month affiliation contract and was not the standard contract, and in the industry, I think, generally it was recognized that a 6-months contract was not as solid as a 2-year contract, and was certainly a flag to the man that this was a trial operation. I wanted to make certain, because I had felt that Mr. Poller tended to be very optimistic about what he was going to be able to do, that he shouldn't be carried away by the fact that he had a standard affiliation. This was borne out by a number of things that happened subsequent to that, and I was always comforted in the fact that van Volkenburg had made it absolutely clear that this was only to be a 6-months contract and not a standard 2-year contract.

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(65) Q. Did you expect to make a profit by operating the UHF station in Milwaukee? A. Yes.

Q. Have you been profiting from the operation of that station, financially? Has it made money or lost money since you acquired it? A. I'm not sure what the entire period of operation would add up to, but I would certainly describe it as a marginal operation. It has not lived up to the hopes that we had for it.

(66) Q. At the time you acquired it? A. That is correct.

Q. If you had known at the time you acquired it what you know now with regard to the financial returns from its operation, would you have acquired it? A. Probably.

Q. Why? A. Again, because I think we are dedicated to the proposition that we want to see UHF succeed.

Q. For that reason, therefore, you would have undertaken to acquire the station, even if it wouldn't have made money for you? A. I won't be so rash 24 hours before an annual stockholders meeting to say that I would have embarked upon a course where we might have lost a half a million dollars a year, but if I had known that it was to be as marginal as it has turned out to be, I must say that I would have recommended going ahead with it.

Q. On the theory you couldn't get hurt by doing it? A. That's right; and there's always a chance that it would turn and succeed.

Q. Do you at the present time own and operate any UHF stations besides the one in Milwaukee? (67) A. Yes, we own and operate a UHF station in Hartford, Connecticut.

Q. When did you acquire that? A. I can supply that for the record. Substantially after we acquired Milwaukee.

Q. Am I right in saying that one of the major reasons for your acquisition of the UHF station in Milwaukee was your interest in promoting the acceptance and use of UHF? A. That was one. The primary reason for owning stations, as far as this company is concerned, is to make a profit.

Q. But in this instance, you were really combining the two elements of your operation, as I understand it; one is the profit-making motive, and the other is the public service. A. Yes.

Q. The event has shown that the public service element in what you did has become the paramount aspect of your Milwaukee operation. A. Yes, but I haven't given up all hope on the profit-making side.

Q. Have you sought to sell the station to anyone? A. We have not.

Q. Have you contemplated sale? A. We do not.

(68) Q. I am going to ask you, as the President of Columbia, obviously an extremely able man of business and affairs, whether it doesn't seem to you unreasonable that you should have abstained from any effort to ascertain what you could have acquired the WCAN-TV station for, and instead have restricted your efforts to acquire the other station solely of what had been told or what you had heard and what you and the industry must, I am sure, know otherwise would be described as a person's ordinary puffing about what they want for a station? A. I think in Mr. Poller's case, you had sufficient evidence that this was more than just puffing, because there were a number of times between the time that we made the affiliation in the early fall of 1953, and the time that we severed our relations that Mr. Poller made efforts to have his 6-months contract changed to a 2-year contract, and these efforts were made both directly and indirectly; and in the course of changing them somewhat on an indirect basis, he was talking about selling the station, and the figure he talked about to some of these people was a substantially higher figure than I thought the property was worth. I have no direct first-hand knowledge of this, but when I had calls from financial people downtown and from others asking me whether the station (69) was worth the amount he was peddling the station for, and these were responsible people who were asking these questions, they were people who weren't inter-

ested in buying the station unless it had a regular or a 2-year normal contract, and as a business man, I thought I had ample evidence of the price range that Mr. Poller was asking for his station.

Q. You have used the phrase "that he was peddling the station." Do you mean by that that he had told a number of people that he was interested in selling it? A. Yes. One person to whom he talked came to see me about whether I thought it was a good buy at the figure that he was talking about at that time.

Q. So that it was obvious to you that Poller had been trying to sell the station to a number of people? A. That's correct.

Q. But at a price that you thought was excessive? A. That's correct.

Q. And some of these people had told you that a station that didn't have the regular or normal 2-year affiliation agreement wasn't worth as much; or, to put it more accurately— A. Well, they didn't tell me. They asked the question.

Q. Didn't they tell you that they knew you knew that (70) what they said to you really was, "Would you give a 2-year affiliation agreement?" A. As part of the deal.

Q. Because that would make it more worthwhile to them for acquiring it. A. That's right.

Q. And inherently, therefore, it followed that not having the normal 2-year affiliation agreement, the station wasn't worth as much. A. That is correct.

Q. And you know that as a matter of general business in your field, don't you? A. Yes, and certainly the prospective buyers knew that, too.

Q. Therefore, presumably Poller knew that, too. A. If he did, he didn't act as though he knew it.

Q. You knew that anybody with any experience in this business knows that a station that has less than the normal 2-year affiliation agreement has an imperfect thing and something that dilutes the value of what the station other-

wise would be worth. A. Well, I would quarrel with the word "imperfect" there.

Q. All right. Have less financial value. A. Yes, because I would not represent to any of the prospective (71) buyers that it was a certainty that this station was going to be given a 2-year contract, and I was even offered a piece of the station under the table if I would cause it to have a 2-year contract by a man that Mr. Poller had gone to.

Q. Now, then, the point that I am trying to ascertain from you is: It is a fact, isn't it, that this station with an affiliation agreement of less than two years' duration was worth less to the regular purchasers than a station with a regular 2-year affiliation agreement, the same station? A. Right.

Q. Therefore, if Poller was asking for an excessive price, he was asking for a price that was excessive even if he had a 2-year affiliation agreement, I gather. A. In my opinion, yes.

Q. And he was asking that even though he had an affiliation agreement that was of lesser duration than two years? A. Yes.

Q. You said that one of the reasons you didn't get in touch with Poller—and maybe I don't have this correct, and, if so, you will excuse me and correct it—you had some experience with Poller that he had made efforts to change the (72) 6-months affiliation to two years. I don't quite know what you were referring to when you made that reference. Do you mean that he was undesirable as a— A. I simply mean that Mr. Poller made every effort, both direct and indirect, that I think was humanly possible to make to get us to change the contract from a 6-month to a 2-year contract.

Q. And you wouldn't do it? A. That's correct.

Q. You didn't hold that against him, did you? A. Yes, I think I would say I did.

Q. Why? A. Because I think the approach that was made in one case was an underhanded approach.

Q. The one you referred to before? A. That's correct. He know full well, that I couldn't, under the law, have any ownership of an affiliate.

Q. Did that affect your not undertaking to attempt to acquire his station? A. It's always a difficult thing to answer. I can't say that it did or it didn't. The primary thing, I think, that motivated me at least to look at what I thought was the less costly property was the exorbitant price that was being talked about.

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(78) Q. Is it your policy not to negotiate with stations that are affiliated with you for the acquisition of their station? A. It is not.

Q. Which is not? It is not your policy to negotiate, or it is not your policy not to negotiate? Literally, you said it is not your policy not to negotiate. A. That is correct. We have negotiated with an affiliate for the acquisition of that particular station in the case of Philadelphia.

(79) Q. You had decided, had you not, that you would not negotiate for the acquisition of WCAN-TV in part because it was an affiliate of yours? A. That is correct.

Q. Why then was there a difference in your policy with regard to Philadelphia and Milwaukee? A. The parallel isn't perfect between Philadelphia and Milwaukee. In Philadelphia we had a long relationship. We had a standard contract. In the case of Milwaukee, we were in a trial situation that we have covered before.

Q. Isn't—excuse me. Are you finished? A. I hadn't finished.

Q. I'm sorry. A. It seemed that some of the activities that I have already referred to on Mr. Poller's part did create something of a cloud as to the desirability of negotiating with him. But the primary consideration was a business consideration having to do with money.

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(80) Q. Do you remember when the notice of termination was given to Mr. Poller of his affiliation agreement; and by that, I don't mean the precise date? Do you know when in point of time in its relationship to your dealing for the acquisition of WOKY and the 5 and 2 rule? A. Well, it was given after the FCC formalized the 5 and 2 rule.

Q. Was it given before the 5 and 2 rule became effective or after; do you remember? A. I don't remember, but my—well, yes. I would fix it as after the rule became final.

Q. Became effective? A. Yes.

Q. Do you know whether it was before or after the exercise of the option to acquire the WOKY station? A. Well, at about the same time. But my recollection is (81) that it was after the exercise of the option.

Q. Why would you think it was after? Would there be any importance to its being after rather than before? A. Well, I think that until you decided on a course of action, it wouldn't make any sense to give the notice of termination.

Q. But you already had the option in your hands and you had time to exercise it, so you could have given notice of the termination of the affiliation agreement knowing that you were going to exercise the option. A. The fact may be that what I am saying isn't just clear in my own recollection.

Q. But regardless of whether it was before or after, isn't it a fact that the exercise of the option to buy WOKY, and the notice of termination of the affiliation agreement with WCAN, and the effectiveness of the 5 and 2 rule of the Commission were all about coincidental? There may have been a short period of time intervening between one and the other, but essentially it was all one in time, wasn't it? A. That is correct.

Q. And essentially the exercise of the option to purchase WOKY and the termination of the affiliation agreement with WCAN were all really one transaction, were they

(82) not? A. Well, if this is a legal question I am not going to answer it.

Q. I am talking so far as CBS was concerned. A. From a practical matter these things did come together at that point, yes.

Q. From a practical matter, they were inter-related and really formed one transaction, didn't they? A. Well, I don't know what you mean by "one transaction," but certainly we have already established, and the facts speak for themselves, that they took place about the same time.

Q. From your point of view, something that happened somewhere else today and here in New York tomorrow, they are very close in point of time, but they have no relationship. What I am asking you is: Did not these two events, namely, the notice of exercise of the option to purchase WOKY, and the notice of the affiliation agreement's termination with WCAN—were not both of these two events, from CBS' point of view, part of the one transaction of your going into Milwaukee? A. Yes. It wouldn't make any sense to have an affiliate and own a station at the same time.

(83) Q. So that inevitably when you decided that you were going to negotiate for the acquisition of WOKY in Milwaukee, that marked in effect also a decision that you were going to terminate your affiliation agreement with WCAN. A. No, sir.

Q. Why not? A. That was purely a protective measure. No decision had been made at that point about the termination of WCAN-TV's affiliation.

Q. But you know that if you did acquire WOKY, you would inevitably terminate the affiliation agreement with WCAN. A. That is correct.

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(86) Q. Dr. Stanton, you said this morning, I believe, that if the networks could have gotten into UHF five years earlier, UHF would have had a better chance. Would you

tel us what you mean by that? A. Well, I guess that was a little self-serving, but what I meant by it was that I thought that if the networks had had the right to go into UHF as well as VHF, this would have indicated to the national advertisers, and I think to the set manufacturers, and to the public generally, that UHF was here to stay.

UHF was late in getting started because everybody naturally went first for the VHF. There were some markets that were pure U, but for the most part they were mixed.

I think if the Commission had allowed the networks to own two UHF stations, as well as the five V's, in the very early days, the networks would have gone U in certain markets before the markets became predominantly V, and you wouldn't have had that conversion problem that we were talking about this morning. You would have had a double-headed set in every home from the beginning. I don't mean that the V wouldn't have gotten started in those markets, but they (87) would have probably grown up side by side instead of one coming along later.

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(89) Q. Had you made any inquiries of the FCC with regard to how it viewed your acquisition of the WOKY station is Milwaukee? A. No, not to my knowledge.

Q. Had you had any conversations with any of the FCC commissioners or members of its staff with regard to that? A. There is the conversation that was held with Lee about the Chicago transfer at that time, which touched on Milwaukee.

Q. Will you tell us about that? A. I think I have done that. It's on the record.

Q. Well, you haven't done it in these depositions because this is the first day you have appeared here—or, to be more accurate, that we have appeared here. A. There is no reason why you—

The Witness: Have you got a copy of that that I can read into the record, I guess?

Mr. Doskow: I don't have it here, but if you want it to refresh your recollection, you are entitled to get it.

(90) The Witness: I think it's a more accurate way to put it in.

Q. We are not parties to whatever the proceeding is that you are referring to where you may have testified otherwise. But we are parties to this proceeding, and I am asking you now if you would tell us, to the best of your recollection, what the conversation was.

The Witness: Is this agreeable with you?

Mr. Doskow: Yes.

A. The dates are all matters of public record, so I'm not going to try to fix the dates from memory.

Q. Can you tell us approximately when? Was it after Holt had gone to Milwaukee or before? A. This was after the multiple ownership rule had been approved, as I recall it.

Q. But before it had become effective? A. I don't know.

Q. Now, just for the record, so that we will be accurate in what you mean, you refer to your having discussed, or stated the facts in relation to this in some other proceeding. Will you tell us what you are referring to? A. Well, there was a memorandum taken from my files of a telephone conversation with Commissioner Lee, which was a (91) part of the Evins Committee, a part of the Celler Committee, a part of the Harris Committee hearings, so it's in three different hearings.

Q. You mean the memorandum itself? A. That's right.

Q. You made the memorandum? A. Yes, taken from my file.

Q. You made the memorandum of your conversation with Commissioner Lee? A. That's right.

Q. Did you give oral evidence on these occasions, or was it the memorandum that was spread on the record?

A. The memorandum was put on the record in all three cases, and I testified in executive session with the Celler Committee on it. I think it was in the summer of 1956. The Evins Committee, I think, published its document sometime around that same time, and the Harris Committee document hasn't been published yet, but it was put in a week or so ago when Commissioner Lee testified before the Harris Committee.

Q. Do you have a copy of the transcript of your testimony before the Celler Committee? A. Not the executive session, no.

Q. That is the only place where you testified before (92) them; isn't it, on this subject? A. I don't know whether this was touched on in the open hearing or not.

Q. All right. Now, will you tell us what the facts are?

Mr. Doskow: Would you want to look at the memorandum to refresh your recollection?

The Witness: Yes, I would.

(Mr. Doskow hands papers to the witness.)

Q. Your counsel has shown you a memorandum which I have not seen. Does it have a date? A. Yes.

Q. What is the date? A. August 13, 1954.

Q. Now, you are examining it in order to refresh your recollection. Is that a memorandum that you dictated? A. Yes, I think it is. These are from notes made of a telephone conversation.

Q. Notes made by you? A. Right.

Q. And then dictated by you from the notes? A. No, written from the notes.

Q. Written by whom? By you? (93) A. I don't know. Not by me.

Q. You mean you made longhand notes during the course of the telephone conversation and then someone transcribed it on this typewritten sheet? Is that it? A. Right.

Q. Are those longhand notes available anywhere? A. I don't know.

Q. Have you seen them at any time since this typewritten memorandum was prepared? A. Not to my knowledge.

Q. Have you ever looked for them? A. I would have guessed that they would have come out when the search was made of the files in response to the request from the two committees.

Q. And they didn't come out? A. to the best of my knowledge, they did not.

Q. All right. Now, you have read the memorandum, I presume. Would you now tell us what the facts are? A. Well, this is something that took place four years ago, so it's very difficult to give you all the facts because it was a very complicated case. This started out with nothing to do with Milwaukee, but—

Mr. Doskow: I take it, Mr. Freedman, that (94) this question is limited to the portion of it that is relevant to Milwaukee.

Mr. Freedman: I am only interested in the Milwaukee situation at the moment.

The Witness: It's almost impossible to talk about Milwaukee without the Chicago part.

Q. Why don't you tell us the whole conversation, because there might be some argument later about what you thought dealt only with Chicago and what we think may have been relevant to this. A. I'm not going to take the time to go into the whole thing because there just isn't that much time to do it. But this had to do with a meeting with Commissioner Lee on the day or so before the date of this telephone conversation. At that time we had an application pending before the FCC for the acquisition or transfer of a Chicago channel, VHF channel.

Q. That was an acquisition by you? A. That's correct. I believe we were buying at that time—I know we were

buying at that time a station whose call letters were WBKB and was operating either on Channel 4 or Channel 5. The FCC at about the same time had shifted channel assignments in the Chicago area, and I believe had given orders to WBKB either about the time we applied to (95) purchase, or shortly thereafter to shift from Channel 4 or 5 to Channel 2. Channel 2 in Chicago had never been assigned on a commercial basis, I believe, but had been occupied, I believe at an earlier time by Zenith on an experimental basis, and Zenith was protesting to the FCC about the shift of WBKB to Channel 2.

Without going into all the procedural matters, because I am not competent to go into them, even if my memory was 100 per cent, this created a problem for the Commission, as well as for us because we didn't quite know where we were. This is the first time this kind of thing had ever taken place.

So that when Lee stopped in voluntarily to say hello the day that I talked with him, that date being either the 11th or 12th of August '54, in the course of the conversation, he asked how things were going, and I told him that I wasn't satisfied with the answers I was getting about why the Chicago transfer was as confused as it was, and that I just couldn't understand these procedural steps that were involved. Lee was completely unfamiliar with the thing and voluntarily said he'd have a look at it to see what the procedures were. We did not discuss the merits of the transfer or anything of the kind. It was pretty much a layman trying to understand or penetrate the procedures of the legal staff at the (96) Commission.

In the course of that conversation, he asked me about the UHF matter. By way of background, I think that UHF was a subject that was talked about a great deal at that time because no one knew what the future was for UHF or just how the Commission was going to deal with some of the thorny problems it had ahead of it on UHF.

I indicated to him that it was our intention to go forward with the acquisition of UHF stations when it was proper under the FCC regulations to do so, and that we were looking at a number of markets, including Milwaukee, and that I supposed the Milwaukee situation would have some bearing on the Chicago case, or vice versa. That's how Milwaukee came into the discussion.

Lee was not familiar with the mileage separation between Chicago and Milwaukee and was asking me some questions about overlap between the two markets, and I wasn't too familiar with the overlap myself at that particular point, and part of his telephone conversation to me the following day, or two days later touched on the Milwaukee situation and the Chicago situation. But in talking with him about Milwaukee, I recall distinctly having mentioned a number of other places where we were looking at the opportunities (97) for UHF, so that this wasn't conversation having to do with WOKY. It was simply talking about Milwaukee, a UHF market, as I believe I talked about St. Louis as a UHF market as well.

Q. Was there anything said at all about your undertaking to acquire a specific station in Milwaukee? A. In my conversations with Lee?

Q. Yes. A. No.

Q. Now, I am not clear, from the way you began the discussion of this, how you and Lee got together. I believe you said Lee stopped in, but I don't quite know where you mean he stopped in to. A. He came in here.

Q. In your office here? A. Right.

Q. Do you know why he came to see you? A. Yes. Lee and one of our employees at that time had been in the FBI together and had been very close friends before Lee went on the Commission, and before the man joined us. That is, before the employee by the name of Berry joined us. Late in the afternoon Berry called me, or came by my office and said that Commissioner Lee had been in—was in town and was dropping by late in the (98) afternoon to pick

Berry up, and would I be interested in saying hello to him as he came by, and I said, sure, I'd be glad to.

As I recall, the time was around 5:00 or 6:00 o'clock in the afternoon.

Q. When Lee came in, you didn't initiate any discussion about UHF, as I understand it. On the contrary, he asked you about UHF. A. That's my recollection. I didn't even bring up the Chicago case voluntarily. Lee was reasonably new on the Commission at the time and was just concerned about how cases and problems were going between the industry and the regulatory agency. His concern about UHF, I think, was shared by some other Commissioners, because if you were to go through the trade press at that particular period, you would find a lot of pro and con copy about the future of UHF, and the whole problem of intermixture, and so forth.

Q. About how long did his visit last here? A. I would guess thirty, thirty-five minutes.

Q. In addition to discussing the Chicago problem, you told him of your interest in going into the UHF field when he inquired about UHF? A. Yes, that was a matter of public record. We had said (99) that many times, that we intended to go forward with UHF.

Q. So that what you were saying to him was not anything new. A. No, not at all.

Q. And presumably he had already known that. A. He may have or may not. I didn't ascertain.

Q. From his response to what you said, did he indicate that he had already known that? A. I don't recall whether he indicated that or not.

Q. You didn't say anything about the specific station that you already had an option on, namely, WOKY in Milwaukee, did you, in your conversation with him? A. This isn't anything I was sharing with anybody outside of the family.

Q. And he was not in the family, of course. A. Obviously not.

Q. Now, then, when he left, he was going to look into the procedural problems that were troubling you with regard to Chicago? A. His telephone conversation, according to the notes, would indicate that he carried that impression away from the meeting.

Q. Did you, too? (100) A. I did not.

Q. What was your impression? A. That we had talked about it, but as you talk about many things with people, sometimes they take sufficient note to follow up and sometimes they don't. I didn't—

Q. So that you really didn't look forward or expect this call from him? A. That's right.

Q. A day or so later he called you? A. That's correct.

Q. He called you from Washington? A. That's correct.

Q. And you were here in New York? A. Right.

Q. What did he say to you on that occasion? You said that he touched on Milwaukee and Chicago.

Mr. Doskow: I take it that this question relates to Milwaukee, Mr. Freedman.

Mr. Freedman: Yes.

A. I'll read you the part in the memorandum that had to do with that.

Q. I would much rather you gave us your recollection, refreshed as it is by your having examined the memorandum. (101) A. I prefer to stick by my notes. My memory isn't that good.

Q. As you please. A. "On Milwaukee, I'm not in a good position to advise you. I am almost afraid to say anything that might influence you because I could be so wrong. No matter what you did there, I am sure it would not reflect on the Chicago deal."

That's the only reference to Milwaukee.

Q. That deals with advising you as to whether you should go into Milwaukee and acquire a UHF station or whether the FCC would approve your acquiring a UHF

station in Milwaukee? A. I'm afraid that I'm not the person who should answer what Lee had in mind on that.

Q. But when he spoke to you, I assume that what he said made sense to you and was understandable to you at the time, and that the fragmentary notation would refresh your recollection. A. The only place the Milwaukee point had any relevance, according to my recollection of the conversation, had to do with this question of its proximity to Chicago, and the overlap situation about which we were both ignorant at the time we were talking because we neither had the engineering information (102) in our head at the time.

Q. And whether the one would affect the other—that is, Chicago or Milwaukee or vice versa? A. No, whether they would overlap in terms of grade of signal that they put down in a common area.

Q. How would that affect your acquisition of a UHF station in Milwaukee? A. Under the Commission regulations, there is consideration given to the question of overlap of signal. You start with the extreme case of where, under the Commission regulations, you may not own two stations in the same market; and as you move away from that market, overlap becomes a factor until there is no overlap at all.

Q. Yes. But the point of your discussion, as I gather it, of Milwaukee in this conversation that dealt with Chicago, was whether your acquisition in Chicago might affect your acquisition or your application in Milwaukee, or vice versa. A. No, not at all.

Q. For the purpose of refreshing your recollection, I show you a page or so of the magazine "Broadcasting/Telecasting" of September 3, 1956, page 50. I call your attention to the language at the bottom of the page under the Arabic number 1, this being an article that deals with (103) supposed documents published by the Evins subcommittee. You will notice there is a reference made to the record of a telephone conversation between Commissioner Lee and yourself in which Lee is reported to have

told you something about the Chicago transaction and then went on to say about Milwaukee, and that he was not in a good position to advise you and that, "No matter what you did there, I am sure it would not reflect on the Chicago deal."

Does that accord with your recollection of your conversation with him (handing to witness)? A. Well, these are excerpts from the memorandum that I read to you.

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(107) Q. Are you losing money on your UHF station in Milwaukee now? A. Without looking at the figures, I can't answer that question beyond what I said earlier that it is a marginal (108) operation. It might be slightly in the red or it might be slightly in the black. But it is on the ragged edge.

Q. What do you consider its prospect for the immediate future? A. About the same.

Q. And for the long range future? A. I haven't got that kind of vision.

Q. You haven't decided to dispose of it, have you? A. I certainly have not.

Q. You mentioned this morning that a number of financial people had communicated with you who might have been interested in buying Mr. Poller's station, especially, I think you said, if there were a two-year affiliation agreement; and that one person had come to see you about that. I wish you would tell us the details of the conversations you had with the people who called you and with the gentleman who came to see you. A. There were two conversations, possibly three, with people in the banking field who called and indicated that Mr. Poller was seeking financing himself, or that a prospective purchaser was seeking financing, and these calls had to do with the long range future of that particular property and specifically had to do with why there was a 6-months (109) clause as against a 2-year clause. A third or possible fourth situation came about when a man called me to set up a meeting for the

purpose of talking about buying this particular station, and he was curious about the same thing and wanted to know what I thought it was worth, what I thought it would produce by way of income, and I was very frank with him about the 6-months contract, told him that that was usual in such cases where we had not fully made up our mind what the long range pull was going to be in a particular market. He indicated that he could buy at a favorable price if he could affect the longer contract. I told him that was not something that I would become involved in; that was something that would be handled by the people in charge of station rela ons. Then he came back at a later time and said, "I've g a better proposition to make to you. You get the 2-year ntract for us and we'll take you into the deal. It won't cos ou anything."

I explained to him that didn't operate that way, and that under the FCC regulations, ownership of a fraction of a station would count against the company's ownership if that fraction were owned by an officer or a director. He persisted on the basis that he would set it up outside so that I could still have it and benefit from it, but the important (110) thing to do was to get the 2-year contract.

Q. Did this man tell you or indicate to you what the favorable price was at which the station might be acquired if you had a 2-year contract? A. He did not.

Q. Did you ask him? A. I did not.

Q. What was the man's name? A. A. A. Strelsin.

Q Did any of the other people who communicated with you on this general subject indicate to you the price that was being asked for the station or at which it could be acquired? A. Yes.

Q. What was the price? A. In excess of $2 million.

Q. Is it the information that they gave you that you had in mind when you said you had heard second-hand that an excessive price was being asked for the station? A. This was only part of the source.

(112) Q. By the way, even though the affiliation agreement is terminable in two years, does it, in the broadcasting busi-

ness, have a value to the broadcaster? A. Our affiliates think so.

Q. Do you? A. Naturally I do.

Q. Does an affiliation agreement have a value or (113) is it a valuable thing, even though the termination period is less than two years? A. I suppose it does, but the fact that—

Q. It would reduce the extent of its value if the termination notice required was shorter? A. Yes, sir. And this would vary from situation to situation. There may be a good reason why it is short in some cases whereas it may mean something entirely different in another situation.

Q. The overall value would depend on the locations, and so on? A. That is correct.

Q. As a matter of fact, broadcasters invest large sums of money in stations in reliance on the affiliation agreement, even though they know that it is terminable in the 2-year period? A. Was this a question?

Q. Yes. A. When you say "large sums of money," you have to relate that. Do you means an exorbitant amount of money?

Q. No. These are substantial matters. A. Oh, sure. Excuse me. I was trying to read something into your question that apparently wasn't there.

(114) Q. In the ordinary course of events where you have an affiliation agreement and things are going well between you and the station that has the agreement with you, you normally don't terminate the affiliation agreement, do you? A. That is correct.

Q. Perhaps there is some intervening reason why you would. A. We don't change any affiliation agreement because of whim. It is based on performance.

Q. Where the operator is performing well, and the station is prosperous, and things are satisfactory in the manner in which it has been done, it is advantageous to you, you normally continue, regardless of the 2-year limitation? A. That is absolutely correct, although legally and

for reasons of FCC regulation, no commitments are given beyond the 2-year term.

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(115) Q. Do you believe that your right to acquire a local station when you yourself, your company, operates a network with which local stations seek affiliation, gives you a power over the local station that prevents them and you from being able to bargain equally across the stable on terms? A. No.

Q. Do you believe the fact that your affiliation agreement with your broadcasters is for a maximum period of two years, so that you can terminate it in two years any time—do you believe that that gives you a power over the local broadcaster that makes your position a dominant one as against him? A. No, sir.

Q. I wish you would explain the reasons for your last two answers as fully as you can. A. Well, this is such a common situation that it's almost like asking me what color the sky is. You just take it for granted (116) that this is known, and I suppose you asked the question out of ignorance about this business because the station-network relationship is not a case of the network dominating the station. In some cases, it's just the other way around.

Q. Isn't it ever the other way around from what you just said? A. What other way?

Q. Where the network dominates the station. A. I wish you would point to a case if you have something in mind.

Q. Well, I will ask you almost what is hypothetical and yet has something to do with the purpose of our meeting here today. Do you think that WCAN dominated CBS-TV? A. No, but we certainly didn't dominate WCAN-TV.

Q. Didn't you, when you could at any time give them notice and terminate their relationship with you and let them go looking for a new affiliation which they may or may not be able to get? Don't you think that gave you great power over them, seriously? A. No, I don't.

Q. Why not? A. What could we do with the power if we had it?

Q. I didn't ask you that. I am not asking you what (117) you could do with it if you say you didn't have it, but first I want to know why you think that is not power. A. Simply from experience. It doesn't work that way.

Q. You may not have wanted to exercise that power. But isn't it common sense that that gave you tremendous power over the local broadcaster? A. I can't find the area where the power can be exercised.

Q. Didn't it exist? A. No, not to my knowledge.

Q. You mean it didn't exist because you didn't choose to exercise it? A. There has to be a place to exercise it.

Q. Then it didn't exist in your judgment because you know of no place in which you would exercise it? A. It didn't exist, period.

Q. All right. Isn't it because of the power you had over him that he kept running to your people and asking you to convert it into the maximum of a 2-year affiliation? A. Well, I expect he wanted the stability that a 2-year contract would give him, but you see, he entered the contract. He didn't have to take the contract on that basis.

Q. I know. A. This was made clear to Mr. Poller at the time the (118) affiliation was made. He made a 6-months contract and then changed his mind.

Q. But isn't that very much the same—when you say he didn't have to take it, isn't that very much the same as U. S. Steel or one of the big automobile companies saying to an employee, "you don't have to work for us"?

Mr. Doskow: I object to that question.

A. I don't see the parallel at all.

Q. Don't you think you are in the superior position to Mr. Poller? A. You are not familiar with this industry, sir, or you wouldn't even ask that question.

Q. I won't contest my knowledge or yours. But I still would like your answer to the question. Isn't it a fact that this man had built up a business and was investing more

money in the rebuilding or the reconstruction of his facilities and in the improvement of them in a business which hung primarily on an affiliation agreement which you could terminate substantially at any time you wanted? Isn't that true? A. No, it is not true.

Q. Why not? What is erroneous in what I have just asked you?

(119) The Witness: Read the question back, please.

(The last question was read.)

A. I stand by my answer, no. If you are referring to the fact that he expanded his facilities, and so forth, and that therefore we were obligated to him, we didn't ask him to expand the facilities. In fact, just the reverse. At the time the contract was made, Mr. van Volkenburg was under instructions to make absolutely clear to Mr. Poller that this might well be a temporary relationship.

Q. Would that indicate to you that he, therefore, as a prudent businessman, should not have expanded his facilities or improved them? A. Well, had the situation been reversed, I doubt that I would have done it.

Q. And therefore, the interim situation that existed with your having given him an affiliation with a limited duration, even more limited than that which generally prevailed, was a warning to him that he might be building on sand; isn't that right? A. Well, certainly it was ample evidence that this might not continue.

Q. And if it would not continue, then he would lose something of real value, wouldn't he; namely his affiliation (120) agreement with you? A. That's correct.

Q. And it was you who had the power at your will to take it away from him; isn't that true? A. Yes, we had. Certainly the contract spelled out the provision that we could terminate the contract in six months.

Q. If you had wanted to acquire WCAN from Mr. Poller at a lower price than he demanded, wouldn't one of the elements which would depress the price have been your

termination of his affiliation agreement? A. Yes, if we had chosen that course of action.

Q. And if you had wanted to buy the station more cheaply than he would otherwise have been willing to sell, one of the ways you could have achieved that result, if you had wanted to do that, would have been to give him notice of termination and then sit tight. A. But this is academic. We didn't do it. This is the difference between the Milwaukee case and the Philadelphia case we were talking about this morning.

Q. What was the Philadelphia case? A. Where I told you we had entered into a contract to purchase an affiliate in Philadelphia. We decided to buy the station at the price the station wanted for it. If the (121) price was too high, we then would not make any further effort to acquire the property.

In the case of Milwaukee, we knew in advance that the price was completely out of line so that we didn't choose to enter into any kind of trading with Mr. Poller.

Q. What you chose to do instead was to buy the station of a competitor of his; isn't that right? A. Yes.

Q. And then having bought the station of a competitor of his, it followed that he came to you and begged you to buy him out, didn't it; because you had cancelled your affiliation agreement? Isn't that so? A. He did come and ask us to buy his equipment.

Q. Well, he asked you to buy the whole business, didn't he? A. This, I think, you'll have to find from another witness.

Q. You mean he didn't ask you? A. That's right.

Q. And then ultimately you agreed to buy his equipment; isn't that right? A. That's right.

Q. So that although you didn't want to deal with him because his price was outside the realm of what you considered appropriate, nevertheless the result of what you (122) did with WOKY was to set in motion a chain of events which brought to you his equipment; isn't that right?

A. Well, if you think there is anything magic in his equipment—

Q. No, I am not speaking of magic. I am speaking now of the inevitable result. Isn't that what happened actually? A. You are describing what happened, but don't try to put in my mouth the causal relationship.

Q. You didn't ponder about that at all? A. Never entered my mind, and I didn't know a thing about it until after I was told about Mr. Poller's visit.

Q. Didn't you ever expect that he would come here once he knew that you had cancelled his affiliation agreement? A. Never entered my mind that he would come in and talk about that. In fact, I had some grave doubts in my mind as to whether it made any sense because I rather preferred, from an operating point of view, to start with brand new, fresh equipment, rather than taking the equipment that had been used by somebody else.

Q. You certainly didn't want to use the equipment of WOKY. A. I've said this morning that we would start from the (123) ground up in both cases.

Q. Well, no. You didn't start from the ground up, though, did you? You used Poller's equipment, as I understand it. A. We used some of his equipment, yes.

Q. But you didn't use the WOKY equipment? A. No, because as I recall the deal, he got some of the WOKY equipment as part of the payment for his equipment.

Q. Why did you give him the WOKY equipment and take his? Why didn't you keep the WOKY equipment? A. Well, you are talking about this equipment as though it's interchangeable, and I think that is inaccurate. He, Poller, as I understand the situation, had more equipment and more facilities in terms of studios and lighting equipment, and so forth than he felt he needed to operate the kind of station he wanted to operate.

Q. You mean the kind of station he would have to operate if he didn't have an affiliation agreement? A. No, I don't mean that.

Q. Why not? A. Because you are asking me to make a judgment about the kind of station he wanted to operate.

Q. No, no. (124) A. He could have gone out and had a larger operation that he had before if he'd wanted to. There wasn't anything the network had to do with that.

Q. Without an affiliation agreement, you think he could have had a larger operation that he had when he was affiliated? A. He could have had. There is nothing that says he couldn't.

Q. Theoretically it is possible and conceivable. A. Certainly.

Q. Practically, do you think he could have? A. Not from a practical point of view, no.

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(129) Q. What was it that combined in Milwaukee to make it desirable to you, even though UHF was doing so poorly there? A. The two factors that I have given you. And I didn't say that UHF was doing so poorly there. All I said is that that wasn't the best place for UHF per se in the country.

Q. How would you rate it for UHF? A. It's immaterial. I don't recall how it rated. But it certainly wasn't the best.

Q. It wasn't one of the best? A. Now we are getting into bracketing. I don't wnow what "one of the best" means.

Q. I don't want to deal unfairly with you and ask you whether it was number 2, when it might have been number 3 or 4. But the implication that I draw from what you said earlier that Milwaukee was not a good example of UHF is that it wasn't doing very well there, and I would like you to tell us more precisely what you mean then.

Mr. Doskow: I must object, Mr. Freedman. (130) I think you are unfairly distorting what the witness has said.

Mr. Freedman: You are entitled to note your objection, however unpleasant.

Mr. Doskow: Thank you.

A. Milwaukee—this much I want to make absolutely clear. Milwaukee wasn't selected because the UHF was doing well or doing average or doing poorly. Milwaukee was selected because it was a market of substantial size where we thought that UHF had a chance and where, from the network coverage point of view, it fit the jigsaw puzzle of national coverage.

Q. Was the manner in which UHF was making out in Milwaukee any element in your decision to go to Milwaukee? A. I think that if Milwaukee had had seven VHF stations, and the UHF station had been the eighth station to come into the market, regardless of Milwaukee's market size, the buying pattern, the nice people, the coverage factor, we probably would not have gone near it. But I can't tell you exactly or precisely where that break point comes. I must say that we imposed one criterion on our own selection of market for UHF which might be of interest to you. I think it has nothing whatsoever to do with this case. That is that we didn't think that our ownership and operation of a UHF (131) station would prove anything about UHF if we acquired a UHF station where it didn't have VHF competition because if everybody had UHF facilities in the market, this doesn't demonstrate the strength or the weakness of UHF viz-a-viz VHF; so that one of the criteria we had for the selection of our markets in addition to what I have already given you was that we would select a market where there was strong VHF competition, and believe me, that's the case in Milwaukee.

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(133) Q. At the time you undertook to acquire WOKY-TV, and to terminate the affiliation agreement with WCAN, did you give any consideration to its possible effect on Poller's operation of his station? A. I didn't; but if I had, I probably would have concluded that this should have strength-

ened UHF in the market, and if he had continued, he would have had an easier time than, let's say, Bartell did, when he was operating WOKY and (134) Poller was operating WCAN-TV.

Q. But would Poller have had an easier time than he would have had before you cancelled your affiliation agreement? A. Immediately, probably not.

Q. And therefore, you, who had been his affiliating contractor, by buying WOKY became his competitor and a competitor with him now under circumstances where he had been weakened by the loss of his affiliation agreement with you. Isn't that true? A. I think our entry into the market as a UHF operator would have strengthened UHF.

Q. For you? A. And for him.

Q. Now, do you really seriously maintain that after you acquired WOKY-TV, and cancelled your affiliation agreement with him, that he would then be in a stronger position viz-a-viz WOKY, now operated by you as WXIX —that he would be in a stronger position in competition with that station now operated by you and without your affiliation agreement than he was against Bartells' operation of that station when he had your affiliation agreement? A. I'm not sure I followed your question. But if I did (135) follow it, that wasn't what I was saying.

Q. I would rather you answer the question. A. I said before that immediately following the change, he would have to adjust his sights. But for the long haul he he had a better chance with us in the market than he did with us not in the market.

Q. In the long haul he had a better chance with you in the market, meaning by that with you operating the old Bartell station? A. Forget what one we were operating. We were operating UHF. There is no resemblance between them.

Q. For the long haul, you think he had a better prospect with you now operating the other UHF station and with him deprived of his affiliation with you on his UHF station than he had had before? A. Yes.

Q. Why? A. Well, because I think that our entry into the market would have created a lot more excitement about UHF, would have stabilized the UHF. He would have benefited from that. And if he had kept the 6-month contract arrangement with us, he had no assurance of that continuing, and I suspect that we would have been urged to affiliate away from him to a (136) VHF station. So by staying in the market and operating a U, or by continuing in the market and operating a U, and if he had continued for the long haul, he'd have been better off than if he had stayed with the CAN-TV questionable affiliation.

Q. So that from your point of view, then, once you cancelled your agreement with him and bought Bartells', Poller was better off for the long haul than he had been before? A. I think so.

Q. You did him a favor, in effect, without having directed your action with regard to his ultimate good or not? A. Well, this is what you are saying.

Q. Isn't that so? That is what you are saying; isn't it? A. I said for the long haul, yes. I think that our interest strengthened him.

Q. Now then, do you think that when you took over Bartells' station, the UHF station, and cancelled your affiliation agreement with Poller, that he was then in competition with a stronger competitor than he had been before in the UHF market in Milwaukee? A. Yes.

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(138) Q. Do you consider it is desirable for a man to have a network affiliation by and large? A. By and large, I do.

Q. Do you consider it to be very much so? I would assume that it is inherent in the nature of your activity. A. It varies market by market.

Q. How about Milwaukee? Wasn't it desirable to have an affiliation agreement in Milwaukee? A. Yes.

(139) Q. Would you, as an individual operator, if you were, much rather compete against CBS than against an

independent who had no affiliation? A. It's an iffy question. There is no situation you can point to where this is the case.

Q. Well, but assuming that that were the case, would it have been conceivable to you that it would be better to compete against somebody who had an affiliation with a national network rather than someone who did not? A. It depends on what your objective is. I can point to one market at least where an independent is doing a good job without a network affiliation.

Q. What would his objective be in that case? A. It's a community service operation as against a national advertising service.

(140) Q. Where the objective is to make money, what would the result be? A. I think you can make more money with a national network affiliation.

Q. There is no doubt in your mind about that, is there? A. None.

Q. And, therefore, the man who would be called upon to compete against a station that had a national affiliation or a network affiliation would be less likely to be successful financially to the extent that he would be if he were competing against one who did not have it? A. Immediately after the change, certainly.

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(171) Q. Now, then, were you familiar with the rates that WOKY was charging? A. I couldn't give them to you now, but undoubtedly I looked at them at the time we were looking at the property.

Q. Do you know whether those rates were increased after you acquired the station? A. I'm sure they were.

Q. Do you know how soon after you began to operate it? A. No.

Q. Approximately? A. I do not.

Q. Was it within a year or a matter of a month or so? A. Certainly in less time than a year.

Q. Your records would show just when that was? A. Not only our records, but it's a matter of published information.

Q. I think you made it clear that they were increased. Can you tell us why? A. Because the value of the station had gone up.

Q. What had made the value of the station go up? (172) A. Circulation of the station, which in turn is a product of the physical plant and the program service that it transmits.

Q. Did you contemplate that the rates would go up at the time you undertook to acquire the station? A. I don't recall whether the WOKY rates—I don't recall what they were, but I would certainly assume that I wasn't naive enough to think that we were going to continue to operate on the basis that WOKY operated.

Q. I assume that you calculated what the financial picture would be, and in the course of that calculation, you took into consideration what the new rates would be that you would establish? A. That's right.

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DEPOSITION OF RICHARD S. SALANT

(3) RICHARD S. SALANT, being duly sworn by the Notary Public, testified as follows:

Direct Examination

By Mr. Freedman:

Q. Mr. Salant, what is your occupation? A. I'm a vice president of CBS, Inc.

Q. Do you hold office in any of the subsidiary corporations of Columbia Broadcasting System, Inc.? A. I do.

Q. Will you tell us what they are, if you know? A. I'm a vice president of CBS Film Sales, Inc.; of a number of

the real estate subsidiaries and a number of other subsidiaries. I don't have the list, but I can get them for you.

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(6) A. The president of the Radio Division, by virtue of his being president of the Radio Division, is vice president of the corporation. The president, as such, of the Division is not a corporate officer, but he is also a vice president of CBS, which makes him a corporate officer.

Q. That holds true, I suppose, too, originally until March of this year, with the Television Division? A. Each of the presidents of the divisions is also a vice president of the corporation, but they're not staff because they're operating heads.

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(10) Q. You do have a number of subsidiary corporations, do you not? A. Yes.

Q. You also have, as you have already indicated, but there are more, I'm sure, a number of divisions? A. There are seven.

Q. Seven divisions. How many subsidiary corporations, do you know, off-hand? A. No.

Q. Do you know approximately how many? (11) A. No.

Q. Are there more than there are divisions? A. Yes.

Q. Can you tell us the reason for having in the one case subsidiary corporations and in the other case divisions? Why are the divisions not incorporated and, conversely, why are the other corporations not divisions? A. I can't answer that.

Q. Have you ever thought about that problem? A. No.

Q. Is there any difference in the manner in which a subsidiary actually works and how a division actually works? A. Yes.

Q. Other than the intrinsic nature of the area of activity? A. Not so far as I know.

Q. In other words, each of them has officers? A. Yes, that's right.

Q. And each of them, division and corporation, has a parent?

Mr. Doskow: I object to that as a wholly legal matter.

Q. Is that right? I am not asking law, I am asking (12) facts. A. I don't know the answer. I don't know whether CBS, Inc. is the parent of a division or not.

Q. Well, what do you think? A. I haven't got any idea.

Q. Who is the boss of the division? A. As the father of four children, parent and boss to me are not synonymous.

Q. I was once a child, and I think there is some synonymous quality between parent and boss. A. Well, Doctor Stanton is my boss. I'm a staff vice president. He's not my parent in any corporate sense of the term at all.

Q. But I am speaking now of the president of a division and the president of a subsidiary corporation of CBS, Inc. Are both equally under and subject to the orders of the president of the parent corporation? A. I'd say that's true.

Q. And they are both equally subject to the direction of the Board of Directors of the parent corporation, are they not? Is there any doubt about that? A. Yes. You try to put everything into neat little boxes. It doesn't work that way. I don't know. The nature of the (13) kinds of areas that the subsidiary corporations work in creates a difference.

Q. But that is only the inherent difference that comes from the difference in the nature of the activity? A. That's right.

Q. Not in the nature of where the authority comes from and where it is exercisable? A. You are asking me questions that are conceptual. I can't answer that.

Q. I'd like you to do your best. A. I am doing my best.

Q. Have any subsidiary corporations ever been changed into divisions, or vice versa? A. Yes.

Q. Will you tell us an illustration? A. Columbia Records was a wholly owned subsidiary corporation. At the time we established the divisional concept in 1951 or shortly thereafter, Columbia Records, Inc. became a division.

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(14) Q. Can you give us one that still exists? A. Yes. Our division called CBS Hytron Division, which is a division that makes electronic tubes and related components, also was a corporation which was dissolved sometime in the early 1950's. That again was a company we bought in 1951. It was the Hytron, Inc.

Q. You said it was a corporation that you dissolved in 1950. A. No. We bought it in 1951 and it was dissolved as a corporation sometime after that. It is now a division.

Q. What was the reason, if you know, for the alteration of its status from a corporation to a division? A. No, I don't. I think it was largely legal reasons, and I don't know what they were.

Q. In effect, whether something—I use the word "something" just to keep it as vague as possible—if (15) something was a corporation or a division was basically a legal question, wasn't it; or decided basically on the decision of a legal problem? A. That's my impression, but it's only an impression. I didn't participate in those decisions.

Q. I know. I assume you didn't. But this essentially left unchanged the relationship of the entity—and I use the word "entity" in a general sense—whether it was a corporation or a division, its relationship to the rest of management remained unchanged? A. If your question is did the fact of their being corporations or divisions make any difference, the answer is, so far as I know, it made no difference. However, it was part of a reorganization of personnel, too, and that made a difference.

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(19) Q. Well, there is no inaccuracy in describing any one of your divisions as being subsidiary to the main corporation, is there? A. Yes.

Q. You think that is inaccurate? A. Yes.

Q. Tell us why. A. Because I think that you again try to divide things into compartments in relationships that don't exist. They are not subsidiaries. They are an operating segment of CBS, Inc.

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(22) Q. All right. Now then, other than the difference resulting from the necessities of the corporate form, are there any other differences between the subsidiary corporations and divisions? A. Other than the differences arising from the fact that they are corporate form and the differences in the nature of their activities, I can't think of any.

Q. If you can't think of any, I should assume, should I not, that there aren't any? A. You should not.

(25) Q. I think we can multiply the illustrations, since the divisions are not corporate entities, where you had a bank account for the division, and you apparently did; isn't that right? A. That's right.

Q. Where you had a bank account in the name of one of the divisions, you had a resolution of the Board of Directors of Columbia Broadcasting System, Inc.? A. That's right.

Q. Identifying the officials who could draw on the account and so on. A. That's correct.

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(29) Q. • • • Now then, what has your interest been as a staff vice president of Columbia Broadcasting System, Inc. in this lawsuit brought by Mr. Poller, if you interested yourself in it in any way? A. Yes.

Q. Will you tell us in what way? A. I'm curious to see how it comes out.

Q. Are you more than curious? A. No.

Q. You are not even interested? A. It presents an interesting problem. I'm not worried.

Q. It presents an interesting problem academically to you? A. No, it presents an interesting problem of whether I pulled a boner.

Q. In what way? A. Trying to help Mr. Poller out.

(30) Q. In what way? A. In taking his equipment off his hands.

Q. Which he begged you to take off his hands? A. You said that the other day.

Q. I am asking you now. A. I'm answering you now. Mr. Poller did not say that. I don't like to characterize it as begging. He did urge us to do it.

Q. Isn't that the same thing? A. No.

Q. Did he plead with you to do it? A. He said he thought it would be a damn good thing for him and for us.

Q. Well, did you do it because he persuaded you it would be a good thing for you or did you do it because you felt as a result of what he said that you would be doing him a favor? A. I did it—I recommended that it be done because I thought it was a good thing for him and for us.

Q. So that you didn't do it just because you wanted to take the equipment off his hands? A. Just because?

Q. Yes. (31) A. No, indeed.

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(35) Q. So that there is no doubt, is there, in your mind, although you say when he came here to see you he didn't complain about the termination of his affiliation, do you entertain any doubt in your mind that he was opposed to have his affiliation agreement terminated by you; and by "you" I mean Columbia? A. Yes, I do.

Q. You mean you entertain doubt? A. Yes.

Q. Do you think he may have wanted to have his affiliation agreement terminated when it was terminated? A. No.

Q. What then? A. Perhaps this is a question of semantics. I think that it's so generally recognized in the industry that when a network buys a station, the normal thing that the station (36) bought in that community will

be the station which carries the network's programs, that nobody except Lou Poller would have thought of opposing a termination on that ground. This is one of the hazards of the business. You don't oppose the inevitable. You don't oppose the normal. I just have difficulty with your word "oppose." If you are asking me was he delighted, the answer is obviously not. Was he distressed, the answer is obviously he was.

Q. You have used that word "distressed" before, and you had limited his distress to the fact that he had equipment on hands, and I was trying to learn from you whether his distress really wasn't on the larger basis, namely, not the mere fact of having the equipment on his hands, but the fact that he had lost his affiliation agreement as a result of which he would have equipment on his hands.

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A. I think he was distressed about the fact that we had bought another station in the market, and then with all the (37) things that flowed from that.

Q. So that the question of the equipment was really a subordinate part of that problem, wasn't it? A. Not at that meeting.

Q. Well, at that meeting it was the whole thing really because that's all there was left to the problem as far as he was concerned. You had terminated your notice of affiliation. A. That's correct. But at that meeting he raised two problems. Let's see whether I can piece this together as my recollection—the first thing that he and Alec Rosenman, or just he, I think—Alec talked very little—the first thing that--

Q. You are speaking of a meeting of October 22, 1954? A. A luncheon meeting, yes. He wanted to know why we didn't come to him to buy the station.

Q. To buy his station? A. That's right. Then, after we discussed that, he said, "This puts me in an awful position because I've sunk so much money into a new

studio," which, as I recollect, was still just short of completion. Studio equipment and so on have considerable value, and it cost him a lot of money. So it came down to that. This was why he had a problem, (38) because he had all this equipment and it was beyond his needs. So it focused on that in fairly rapid order.

Q. Did Columbia know that he was, at the time you gave notice of termination of the affiliation agreement, engaged in the construction of these facilities? A. I can't answer for myself, but I'm certain that Columbia must have known because Lou's—Mr. Poller's—

Q. You can call him Lou. A. Lou's habits, which I don't quarrel with—I think all affiliates do that—is pelt us with pieces of paper on what they are doing and what their plans are and whenever they expand facilities or do anything of any significance. They really let our station relations people know, with copies to be sent to three different offices.

Q. Why do they do that, do you suppose? A. To indicate—to keep the network apprised of the things they are doing to improve their position in the market.

Q. Why do they care to do that? A. Well, our criteria for affiliation include the aggressiveness of the management, its progressiveness. We obviously would affiliate, to stay affiliated with or switch to a station in the market which has spanking good equipment and (39) is doing a job.

Q. So that actually the reason affiliates are in the habit of doing this is to indicate to the network that they are doing a good job and thereby to try to increase the likelihood of their affiliation being retained? A. You'll have to tell me what you mean by "doing this."

Q. What we have been describing, pelting you with information. A. Oh, yes, certainly. Yes.

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(41) Q. Actually, Poller wanted you to buy his station, didn't he? A. As of what time?

Q. At any time. I will embrace that in the question. Weren't there times, or wasn't there a time when Poller indicated to Columbia that he would like you to buy his station? And I am speaking of WCAN-TV. A. I recollect a letter a month or six weeks or two months, somewhere in the late summer of '54, in which he said that if we ever wanted to buy in that market, he would deal with us voluntarily.

Q. Was his invitation ever considered seriously? A. No.

(42) Q. Do you know why not? A. Yes.

Q. Why? A. Because we had ascertained to our own satisfaction that there was no use in negotiating with him because of the inflated ideas he had about what we were willing to pay.

Q. Had you decided on how much you were willing to pay? A. No. We had decided how much we wouldn't pay.

Q. How much had you decided you wouldn't pay? A. We wouldn't pay in the neighborhood of a million and a half, two million or two and a half million dollars. I'm speaking loosely there. I have forgotten the exact amount.

Q. Just some large figure is what you mean? A. It was a great amount of money that we had ascertained to our own satisfaction he'd put as a value on his station.

Q. Do you know how much money he had put into the station? A. No. I don't.

Q. Do you know what relationship the figure you had heard about bore to what he had really invested in the station or put into it? A. Do I know?

(43) Q. Yes. A. No.

Q. Did you know? A. No.

Q. Did anybody in Columbia look into that, to your knowledge? A. No.

Q. By "No" you mean to your knowledge they did not? A. I don't know, to my knowledge.

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(45) Q. You know, do you not, that those prices that were given were not given to Columbia Broadcasting System as the purchaser but to others as the prospective purchasers? A. Yes, I know, and that's precisely the trouble.

Q. Why? A. Because—well, I suppose I'm responsible for this policy as much as anybody in this company. As a matter of policy, I think it wholly improper for us to get into a position where we get a special price.

Q. Do you think that if Columbia had gone to Poller and said, "Now, look. We're seriously considering going into Milwaukee and we're going to buy a UHF station there (46) and it will be either yours or WOKY. We have heard figures that we consider utterly out of question. How much would you sell it to us for?" Do you think that in such circumstances you would have gotten a lower price from Poller or is it likely, in your judgment, that he might have gotten a lower price? A. I never analyzed it that way. I felt that once the figures came to me were in the air, once that price had been set, the fat was in the fire.

Q. Why? A. Simply because once that price was established in a general range, I would feel—and I have stated this as a policy—that that is the price we would have to pay.

Q. Why? A. Because I don't want to bargain with an affiliate on price.

Q. Why? A. Precisely because of the difficulties that people like Mr. Poller would raise.

Q. What were they? A. Claiming that we were improperly using our affiliation to grind down an individual and an individual's price.

Q. How could you grind down an individual's price if (47) you wanted to? A. By telling a guy that if he didn't come down in price, we'd go across the street and take the affiliation away from him, go across the street and buy.

Q. Isn't that exactly what you did in this case, except you didn't tell Poller that? A. No. I should say that—

Q. Didn't you go across the street and buy a station and terminate his affiliation? A. We did indeed, but we didn't use it to bargain with Poller.

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(48) Q. Now, you did go into Milwaukee and you bought a station that was in competition with him. That's correct, isn't it? A. Yes.

Q. And you then terminated your affiliation agreement with him. That's correct, isn't it? A. Yes.

Q. In fact, you terminated your affiliation agreement with him before you exercised the option to buy the (49) competing station. A. The record will show that. I don't know that.

Q. Regardless of what the dates were in regard to the formal actions, it was all part of one transaction. You weren't going to buy the station of WOKY-TV and continue to let Poller be your affiliate in Milwaukee, were you? A. No.

Q. So that it was inherent as part of your decision to buy WOKY-TV that you would terminate your affiliation agreement with Poller or with whoever else the person might have been who then had an affiliation with you in Milwaukee, wasn't it? A. The word "inherent" is yours.

Q. Well, inevitable. A. Yes, I would say so.

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(52) Q. How then do you actually go about acquiring a station from an affiliate? You have to buy it only if you are willing to pay the first price he mentions? A. That's correct.

Q. You wouldn't discuss price other than say, "Yes," to the price given to you, or, "No," and that's the end of all discussion? A. That's correct.

Q. So that— A. Wait a minute. I ought to modify that. We are talking about ultimate price. There can be and there has been some question of how to work out the amount that the seller wants.

Q. You mean the manner of payment? A. Yes. You know, capital gains and this and that. That, of course, there is discussion on, because it's a question of whether you are going to do it by cash or whether you are going to do it this way or that way. But the net price that they want or the one that they state—

Q. Is non-negotiable. A. Is non-negotiable from our point of view. Maybe this (53) is a mistake.

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(71) Q. You were on a nearby island out of the country. Do you think or have any reason to know—and by "You" I mean, unless I'd say otherwise, actually your general opinion as to what others in Columbia as well as (72) you may have thought—did you think that NBC was interested in a station in Milwaukee?

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(73) A. We had no reason to believe one way or the other that NBC was interested in the market. We were very concerned though, that somehow or other we avoid picking the same market that they did because that wouldn't do a thing. That wouldn't prove anything at that time.

Q. I don't follow you. A. Well, if we both went into a market—and this is unfortunately what did happen in Hartford—I think that was a disservice to UHF. I think the more islands you can create for UHF to keep its foothold, the better off you are. The networks only have so many shots they can fire, and to shoot at the same target is unfortunate from the point of view of UHF, and I think it's too bad it happened in Hartford. But it happened.

Q. I want to bring you back to this human being who is named Lou Poller and to whom you have referred to now in what I think are two opposite ways. At your earlier part of this meeting this morning you said you admired him. A. I did.

Q. Some of the things you have said later would make it difficult to believe that you continue to admire him. A. That's correct.

(74) Q. Now, will you tell us in the first place why you admired him in the past? A. Yes. Lou Poller represented to me a new generation of broadcasters, the young, aggressive, alert guys that hadn't gotten to taking things for granted in pushing buttons. They were really doing a job. He was an individual operator, a scrappy guy. There are a couple of other factgors I suppose I shouldn't add.

Q. Why not? A. He and I thought alike on where the industry is going, and politically, too. I met him from time to time and I thought he was—I got along well with him. I thought he was a nice guy.

Q. So that when you say you admired him, does that include his ability as a station operator? A. Insofar as I have any judgment on that, the answer is yes.

Q. Do you have any judgment on it; because I don't want your answer to be equal to zero, and theoretically it could be? A. I'm not really an expert on station operations. What I am interested in is a guy's general attitude of what the broadcasting industry is about and what he can do in his (75) community and in doing a conscientious job, and I certainly got the impression that Lou Poller was that and would do that.

Q. Aside from your own individual knowledge, do you know how he was regarded by the Columbia people as a station operator? A. Yes.

Q. Will you tell us? A. Not highly.

Q. Can you tell us why? A. Yes. The impression among some people at CBS was that Lou Poller was too much of a promoter.

Q. Do you know whether they considered his operation at WCAN-TV as successful or as being well conducted? A. No.

Q. Do you know what any other people in the industry thought of his operation at WCAN? A. Do I have to answer that question honestly?

Q. What do you think? A. The answer is yes, but I do know—but then the next question that you are going to ask

me I'm going to have to tell you is on awfully slim kind of recollection.

Q. All right, go ahead. (76) A. The next question is what was his reputation, and I'd say it was not good.

Q. In what way? A. He was regarded as being a sharp guy in the business. Now, I didn't regard him as a sharp guy. I was very anxious that we affiliate with him.

Q. Why? A. Well, I guess I'd have to explain it this way: I thought that with our interest in UHF, one of the best things we could do was to cut away from the monopoly station, the VHF in Milwaukee, and give a primary affiliation to a UHF in an intermixed market. Lou Poller was the guy that I had to run into and I knew and he seemed to me to be just the kind of guy who stood a chance of making a go at it.

Q. Why? A. Because of his aggressiveness, his alertness. He's a hard fighter.

Q. He is a man of ability, isn't he? A. I would say so, yes.

Q. Now, you said with your interest in UHF. What was your interest in UHF? A. Our interest was in doing what we could within the limitations that the economics of the business and advertisers (77) impose on us, to see UHF grow and expand.

Q. Has UHF grown and expanded? A. No.

Q. Why would it be to your interest that UHF should grow and expand? Wasn't it equally your interest that VHF should grow and expand? A. VHF had grown and expanded about as far as it could and we are bursting at the seams in this business. Broadcasting has to find someplace else to go and the twelve VHF channels don't provide sufficient room for all the competition.

Q. What do you envisage now that UHF has not expanded? A. Trouble.

Q. In what way? A. As long as we don't have enough room to allow for more stations than the economy will support, there is going to be trouble because there is some

degree of artificial—artificial in the sense of limitation of spectrum space, artificial restriction on the normal growth that the industry could stand.

Q. What has Columbia done to make UHF expand? A. Well, it goes back a long way. The first thing, we (78) were the first entity in the business to propose the use of UHF, back in '46 and '47. We said that UHF was usable. As a matter of fact, you see, that was before you got the issues of intermixture and compatibility, because there were only about 5,000 sets in the market. VHF, that is. We proposed that everything be moved up to the UHF, and we took a licking at the hearings. We were the champions of UHF. Dumont said the signal wouldn't go farther than the line of sight. They said wherever the signal is, if you stand where the transmitter is, the signal will only go as far as your eye can see. Their estimates at that time were ten and twelve miles. RCA and NBC took the same position. We got licked. But that was our position.

Then at the time of the freeze in '52 when it became apparent that VHF was not large enough to accommodate all the demands, we filed our comments as vigorously as we knew how, urging against intermixture. By hindsight it's easier to say we were right. I can't say that the Commission did a wholly unreasonable thing. They had some good arguments for intermixture.

Q. VHF and UHF? A. Yes. But by hindsight, had they followed our advice and others in the industry, we would have no monopoly (79) on that proposal at that time. By hindsight, UHF would have gotten a lot further. We urged, when UHF was opened after the freeze was lifted, that the networks and other multiple owners be allowed to go into UHF in ownership of stations without sacrificing their quota of VHF. As Doctor Stanton described the other day, as we said in the document we filed with the FCC, we thought it would give it the impetus and set the example and persuade Madison Avenue that this was something here to stay. Then wherever possible, wherever it didn't

mean a terrible competitive licking and the hopeless attitude of advertisers, we have affiliated with UHF. But that has its limitations. That is, in many cases. We have worked out some market plans which, I am sure, you don't want to know about. We call them extended program services and extended market plans, which designed to help provide program service where an advertiser ordinarily would not order the program service—and it's the advertisers that control it—for the smaller stations, most of which are UHF. We made speeches, for whatever they are worth.

Q. You don't think they were effective, do you? A. No. We went before the Potter Committee in 1954, which was just about the last gasp, and urged a selection de-inter- (80) mixture program. You see, the further you go along the road of more and more VHF only receivers and more and more stations coming into a market where VHF stations were otherwise with some UHF allocated, the more difficult it is to unscramble it. So this was the last—just about the last time, chronologically, I think, that you could have any substantial scale of de-intermixture which could serve UHF. We were very much criticized for that program, but we made it. We proposed it.

Q. Now, what have you done to expand UHF in Milwaukee, if anything? A. We operated this station as well as we knew how.

Q. That is the same thing Poller was doing. A. I suppose that's right. I will say this: I think that pressures, outside pressures might have gotten so bad that we couldn't have stuck with Poller in any event.

Q. What do you mean by "outside pressures"? A. Advertising.

Q. Will you explain that to me? A. Well, an advertiser doesn't want a UHF station if he possibly can get a VHF station. Our affiliation Plans Committee determines the basic criterion for deciding with whom you are going to affiliate. It is putting together a very complicated (81) jigsaw puzzle and getting the facilities in each area, in each

market, that will provide the largest circulation without duplicating something else. Now, when we have a UHF station affiliate in a market and there are V's available, the advertiser screams. He just doesn't want any part of that.

Q. He wants the V? A. He wants the V.

Q. But now your station in Milwaukee is a U, isn't it? A. Yes, it is.

Q. What are you going to do about that? A. We can resist the advertiser for a while longer, at least, with, "Look. Don't be silly. We have to have a U because the Commission expects us to have a U."

Q. What does the advertiser care about what the Commission wants? A. We have an argument to make.

Q. You have a defense to make? A. A defense to the advertiser. They're not happy about it.

Q. That is highly irrelevant to the advertiser, isn't it? (82) A. No, it's irrelevant in terms of the added circulation or the circulation he isn't getting. But it's relevant in the sense that they do say, "I understand the position you are in and I can see why you don't affiliate with a VHF in that market."

Q. Why does the Commission want you to have a U? A. They're anxious for UHF to work, too, for the same reasons, because we are all getting squeezed.

Q. Have they ever indicated to you that they want you to continue with the U station in Milwaukee? A. I'd have to put it in terms of general attitudes. I think that it would be the kiss of death to UHF if either NBC or CBS abandoned a UHF station.

Q. If they abandoned one? A. Psychologically it would be terrible.

Q. If they abandoned one UHF station? A. One of the two they have, yes. That's 50 per cent abandonment.

Q. How long do you think Columbia is going to continue to suffer this deprivation in order to please the FCC's general view? A. Just as long as we can.

Q. How long do you think you can? (83) A. I don't know. That would involve two questions. One is what will

the pressures of the advertisers be; will they build up, will it get any worse. There are three questions, I should say.

Second, how long are people in the Milwaukee area going to keep the UHF head part of the receiver in shape. I don't know whether you know it requires a special tube and it's a delicate tube to work your UHF converter, and they are always the first to go in your set. And if people, the owners of the receivers, can get enough other programs, they don't bother calling up the serviceman to fix it just so they can get this station. This is a real problem. So there is a constant accretion of difficulties.

There was a third reason, and now I've forgotten what it was.

Q. Maybe that's the best. See if— A. The third reason is how long will there continue to be possibilities of UHF survival or hope. That's is, I suppose, the major one.

Q. I rather gather from what you have said hope has pretty much departed. A. Not hope. We are still hoping.

Q. The reasonable expectation has pretty much de-
(84) parted. A. I would say that's right.

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Q. Have there been any meetings of any of the Columbia officials with regard to the question of how long you are going to stay in UHF in Milwaukee? A. No.

Q. Have there been any discussions about the problem of your staying in UHF? A. Not serious discussions. There are salesmen and people who operate that station who say, "How long? Oh, Lord, how long?" And we say, "Forever!" That's all.

I once got a memo from the operator of WXIX after this suit was brought.

Q. Saying what? A. It was a personal and a facetious memorandum saying, (85) "Let's get even with Poller. Give him back the station."

Q. I gather from that you are losing money. A. No, we are not losing money.

Q. You are not making money. A. Some months we lose and some months we are $1,000 in the black.

Q. How about on an annual basis? A. It was so close the last year I don't remember whether they were in the red or black.

Q. And at the moment its prospects look like they will be better? A. We've got advertisers to deal with. Do I have to answer that?

Q. Yes. A. I think that's right.

Q. I assume that what is going on with the two stations that you have with UHF applies to any other network station; that is, UHF? A. Let's not say two stations. The situation is easier in Hartford than it is in Milwaukee.

Q. Do you know why? A. Yes.

Q. Why? (86) A. Milwaukee, so far as I know, is the only market in this country—and it's a fairly important market—where a U is competing against three V's.

Q. What is the U competing against in Hartford? A. One V. Let me be accurate. There is one V in Hartford. There is a V in New Haven, and New Haven does get into Hartford but doesn't cover it from within, obviously.

Q. Do you know what the rate of conversion to UHF is now in Milwaukee? Has the tempo of it slowed up in the light of what you have been saying, or has it continued or what? A. You ask a question that I hesitate to answer because there is a constant argument about what is your base in trying to decide what the rate of conversion is. It depends on what you are talking about, whether you draw a circle ten miles out, twenty miles out, thirty miles out, and obviously we always draw the smallest reasonable circle so we can say it is the highest possible rate.

Q. Put it in your own terms, anything that you think would be a fair standard. A. I'd say it's a constant battle between getting new conversions, which are offset by the loss of old ones because of this—I have forgotten what kind of a tube they (87) call it that keeps going out.

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Q. You sat through the deposition of Doctor Stanton that was taken on Tuesday, did you not? A. Partially prone. Yes, I sat through it.

Q. Did you hear him say that if UHF had been author-
(88) ized by the Commission five years earlier, its prospects —and I am now paraphrasing and don't purport to quote him—its prospects would probably be much better, or something to that effect? A. My recollection is he said that if networks had been authorized to own a U, and other multiple owners, you might be right.

Q. I wish you would tell us your view on that same point and do it on the basis of what you consider he said. A. As I said before, the problem has been partly psychological. That plays a big part of it. If you read the hearings before the Potter Committee and the Magnuson Committee, you will find that one of the great obstacles that had to be overcome is Madison Avenue, the advertisers. They have this fixation—it's historically part of the great fight in '47—and some of the other elements of the industry that laughed at us when we said UHF could get beyond line of sight. There was an awful lot of, let us say, propaganda that UHF was no good at all, and this created a bad atmosphere that has never been overcome. So that was the psychological problem you had with advertisers who were unwilling to order UHF if VHF were available, and sometimes even when it wasn't available. If it was just (89) an all UHF market, they'd skip it.

The second is the public. The sets are more expensive. They're trickier and the antenna installation is much more difficult and much more expensive.

Now, we felt that if the most established entities in the business—networks, multiple owners like Westinghouse and so on—were allowed at an early stage to say, "We are confident in the future of UHF, confident enough to build a $1,000,000 worth of plant or $500,000 worth of plant," or whatever it is, this would have an important psychological effect. The advertisers would get the feeling that U's aren't

eleemosynary institutions. They mean business, so maybe it's all right. The public would get the feeling it's worthwhile to spend the extra $60.00 or $80.00 or whatever dollars it is to get an all-channel set, because the networks and the people with big names—you know, mean business, and so they are not just throwing away their extra money. It's going to be there.

Q. Now, couldn't all that be done if it started five years later? A. No.

Q. Why not? A. The problem is the accumulation of incompatibility. It (90) is much easier if your original installation—I'm talking about the home owner—if the original installation was an all-channel set, and his antenna is built originally for receiving UHF as well as VHF. It is always true that in home appliances—I don't know of any other field—fixing something up after you have got it, converting it to a new use, is never as good. It doesn't work as well, it's more expensive.

And you have the problem of five years later. Five years later than what I don't remember.

Q. Five years later than any fixed point. A. Let's take it now. You have this problem of forty-two million sets of which—I'd just have to guess—all but five million are VHF and the antenna installation is VHF only. It's one thing to overcome that when it's there, and it's another thing if you are working more from scratch, clean. There are fewer sets, and whoever is going to buy a set buys an all-channel set.

Incidentally, there is a difference between an all-channel set in price that is built in and where you have the guy convert it. It's quite a substantial difference.

Q. Which way? A. It costs much more to convert it than it does to get (91) the thing all in one package.

The problem was complicated, too, in a way that might never have been complicated had it been established earlier, and that was, if you recall—my dates aren't going to be exactly accurate—it was two or three or four years ago, this great drive towards portable sets and towards indoor

antennaes. They are very difficult to work for UHF. Now, I don't think that you would have gotten as many portable sets or sets using indoor antennaes, if UHF had been more established. People wouldn't have bought a half a set.

Q. I'd like to ask you this: Do you think that a network that has an affiliation with a local broadcaster, where the network wants to go into that locality, owes some duty —I am not speaking now of law—but owes some moral duty to negotiate with its affiliate rather than to go to a stranger and buy his station, knowing that if it buys his station, it would be bound to terminate its affiliation agreement? A. No, sir.

Q. Do you think that a network in those circumstances has any moral duty to ascertain whether its affiliate would be interested in selling his station under those circum-
(92) stances?

Mr. Doskow: I want to note for the record an objection to the questions about moral duty. If the witness wants to answer, I have no objection.

A. Could I answer it this way: Yes. I would have been very unhappy about our going to WOKY if we had no idea but what Lou was prepared to sell and prepared to sell at a price that was within range. Yes. Does that answer the question?

Q. Except that your "but what" might be misconstrued. If you had no idea whether he would be willing to sell his station at a price within your range. Is that it? A. That's right.

Q. And you felt that the problem had been cleared up by this information that Doctor Stanton had mentioned on Tuesday of people who had come to him and reported second-hand to him about some price that Poller had mentioned to them. A. Yes. I think you are belittling it by calling it second-hand, because it is the sort of thing that—

Q. I am just describing the words he used. A. You put those words in and he agreed. I think the (93) record will show that.

Q. Really? A. Yes.

Q. What words would you use? A. I'd say that he had found out, on the basis of—on reasonable bases what Lou Poller was thinking of.

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(95) Q. Now, wouldn't you advance UHF generally better if you maintained your existing affiliation agreement with a UHF station in Milwaukee and went elsewhere with the acquisition of a UHF station, or with another affiliation agreement elsewhere with a UHF station? A. It's a hard question. I suppose theoretically yes, if you make some assumptions about what other market you went into. My guess is that it would almost have to be, as a practical matter, a market where we had a UHF affiliate, so that we would have been back in the same pickle in the (96) other market, only Mr. Poller would have been unscathed for another few months.

Q. Why? What would have happened at the end of a few months? A. As I say, I think that the pressures were such that it was just a question of time with the new VHF stations coming on there and with both other networks having VHF affiliations, that we would have had a hell of a time sticking with a UHF affiliate.

Q. You think he was doomed in any case to have his affiliation terminated? A. Yes, I do. I think that that's the precise reason why there was a six-months—one of the reasons that there was a six-months termination clause.

Q. Why would it be necessary for you, if you went into another market, to go where there already was an existing UHF affiliation?

A. Much as we want to promote—wanted to promote UHF, we are still not a charitable institution engaged in Quixotic things. I don't think we can be. I think it would have been out of the question for us to go into a market where there were nothing but VHF's in operation and try to break ground from the bottom up. You have to (97) assume that this would be a market where there were

several stations. We like to go into markets that aren't too small. So that if you are talking—what you have to assume is that it would be a market, let's say, where there were at least two VHF's and no UHF stations, not even a network can manage to begin to break ice there. So it had to be a place where there was a foothold in UHF.

Q. In Milwaukee, when the two UHF stations went into operation only a relatively short time before, they had done precisely that thing. A. Wait a minute. Yes, but it was where you only had one V.

Q. All right. There was one V. Milwaukee is a pretty big market. A. Yes, but let me just make it clear that having two V's in a market doesn't make it twice as hard for the UHF as having one V in the market. It makes it many times harder.

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(99) Q. All right. Now then, you have made some reference to it a moment ago, and I want to recur to it now, that one of the reasons why you had this six-months termination clause with Poller was because of the existing situation in Milwaukee or what you envisaged as a likely outcome of the then situation in Milwaukee. Would you elaborate on that and tell us just what it was that caused CBS to give him the limited six-months termination provision in the contract? A. Yes. It was to maintain fluidity, because the situation was quite unpredictable. As Doctor Stanton told you, we were having a very tough time with the dominant VHF, which was affiliated primarily with NBC, and kicking our programs around very badly. We were being hurt up there. We thought that it would be a good idea to try to go into UHF. As I told you before, there were some doubts within the organization about what sort of an affiliate partner (100) Mr. Poller would make, and they weren't doubts I shared. Other people had them. And there was the whole problem with a UHF, how long would we be able to stick with a UHF affiliate against an NBC VHF affiliate.

Q. Did anybody from CBS ever tell Poller that they had doubts about the desirability of keeping him as an

affiliate; him personally, as distinguished from what might be the effect of the VHF competition? A. I can't think—yes, I would say that an explicit way of telling him was the six-months provision.

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Q. Now then, if you wanted to advance UHF generally, I come back to the question: Wouldn't it have been better to leave these two UHF stations, one of which was your affiliate, as they were in Milwaukee, competing as best they could with the existing VHF station, threatened as they were by the probable creation of a second and maybe (101) a third competing VHF station, and for you to have taken your good will towards UHF elsewhere and tried to exploit some other area instead of diminishing the number of UHF stations in Milwaukee? A. In the first place, I am not prepared to concede at all that we contemplated or expected a diminution of the number of UHF stations in Milwaukee, and that seems to be your question. So let me put that aside.

Q. Temporarily. A. Of course. I recognize you are going to have to come back to that. But it would depend on what the situation is in the other market to which you are shunting us. I would guess that as a practical matter it would have to be a market where there was a situation roughly similar to Milwaukee where you had some UHF foothold. So that the only difference would be the difference in the name of the community, but not the difference in the situation.

Now, if what you are suggesting is wouldn't it have been better for UHF if we had gone to Pittsburgh or some place where there was nothing but VHF but there was a UHF channel available—

Q. Yes, that is what I am suggesting. A. The answer is this: This really wouldn't have helped (102) UHF because we couldn't have done it. It was Quixotic. If we don't have to pay attention to advertisers and we didn't have to pay any attention to the fact that we were supposed to operate in the public interest, we still have to have revenues.

Q. Yes. But now Bartells did it, didn't they, in Milwaukee? A. Don't you see, Milwaukee—yes, Bartell did it and he wasn't on the air very long. And Poller did it and he wasn't on the air very long without an affiliation, and wouldn't have been on the air very long in those circumstances with our affiliation as the situation developed.

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(103) Q. Now, your going into Milwaukee, as I understand it, was motivated by your desire to advance UHF. What I am suggesting to you is that since you have not made money by going into UHF and didn't really expect to make money, I presume— A. No, we did expect to make money. Our expectations have been disappointed.

Q. You mean you expected to make money? A. Oh, yes.

Q. Right off in Milwaukee. I don't mean the first (104) day, but the first year or the second year? A. I think so, yes.

Q. So that it wasn't entirely merely to advance UHF? A. Oh, no. I never said it was.

Q. Also to advance your financial position? A. Oh, yes. That element is always present.

Q. Of course, that would advance UHF, too. A. If we made money out of it, yes, you're darn right. That's a good point.

Q. Did you give consideration to the desirability of going into strictly a UHF market? A. No.

Q. Why not? A. Because we felt that this wouldn't prove anything so far as the desirability of UHF was concerned. It's pretty easy to go into a market where there is nothing but UHF. There is one of the places where UHF has no trouble. Fort Wayne, I think—no, I can't—there are a few of what we call UHF islands where they have no substantial competition from a VHF, none within the community and none coming booming in from outside. There life is sweet for UHF.

Q. They could do very well? A. They can do very well, yes.

(105) Q. Do any of them have affiliations with you? A. Oh, yes. South Bend is another one.

Q. And you didn't consider the desirability of your going to one of those areas? A. Well, quite literally we recognized that would have been very desirable. It would have been the easy way out, but we just didn't think that that was what the Commission had in mind when it was going to allow networks and other multiple owners to add to their quota.

* * *

(116) Q. Well, if you look at it in the abstract, the network is the important thing for the local operator to have. He gets it, he wants to continue it. He would like to have it as long as he can. Yet he invests money (117) and builds a business, and if it prospers, one of the main foundations for it is his affiliation agreement, and he lives a life in business in which he has a great investment or substantial investment depending on the station, where he may be doing very well and the whole thing rests on his ability to continue to have the affiliation agreement go on. Now, any businessman in those circumstances would feel much more secure, wouldn't he, or to use your word, would have greater stability if he had a long-term agreement rather than one which the networks could tear away from him in any two-year period? A. Oh, yes.

Q. Now, the networks, on the other hand, by and large, except for the rare case that you have indicated where the local station may be of such significance to the network that they are in a position of being the inferior and the other in a dominating position—but by and large it is the local operator who is the one who wants the network rather than the network that needs that particular broadcaster. A. No.

Q. Why not? A. That's wrong. It is also to a network's advantage (118) for there to be stability. Now, historically things were tough for CBS because it was the

second comer into television, and NBC—this was again going back to our fight to have everything moved up to UHF in '47, which delayed us, and then the color thing which delayed us further. So that NBC picked off the cream of the stations, the VHF stations. They had the stations in the one-station market and so on, and we had to go for a long time on a catch as catch can basis, picking up whatever was around in the market. So for a period as more stations came on the market, we tried to improve our affiliates. But we are now entering into a period of stability where there are awfully few switches in affiliations because it isn't good for a network to have switches. You build up a listening habit. Channel so-and-so in a community is the one where you get CBS programs. You try and the stations try to create a character for the station. It means something, or we hope it means something in the community, both because of the local programs and because of the network programs. If all of a sudden you switch, it isn't good. It's bad for listening habits, it's bad for your general stability and the affiliation relationship in many senses, using the word loosely, is a partnership, and it doesn't do for partner-(119) ships to be frightened of each other all the time or to be afraid that there is going to be a divorce in a minute. And so stability helps us as well as the station.

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(122) Q. Now, to come back to this question, there were two UHF stations at the time you began your negotiations with Bartell. A. I think we have established that, yes.

(123) Q. And then as part of that, you cancelled your affiliation agreement with Poller. A. Correct.

Q. And Poller came to you and said, "Take the equipment off my hands." Is that right? A. Is that the end of your sentence?

Q. Yes. A. No.

Q. That is the end of the sentence, not the end of the story. A. That's the end of his sentence.

Q. Go ahead and tell us. A. "I'll take yours."

Q. "And I'll take yours." A. Yes.

Q. Did he ask you or did he offer to take yours? A. He asked to take ours.

Q. Do you know why he asked to take yours? A. Yes.

Q. Why? A. He said that he felt that there was room in television for the television parallel or equivalent of the radio music and news operation, and he thought this was a place (124) where it could be done and he was going to do it.

Q. On UHF? A. Yes, indeed. That's what we were talking about.

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(130) Q. Had Columbia made any arrangements before Poller came to see you the day after he got the notice as to what equipment you would use for the WOKY station or what studios you would use? A. I'm sorry—

Q. Let me add or decisions. A. Yes. My recollection is that as is usually the case when you go into a new operation, the engineers—using engineers broadly as the people who have to do with that—made a study of what kind of studio we wanted and what its cost was and how many cameras we'd have to have and how much that would cost. They blocked that out pretty well. My recollection is that I saw estimates and things prepared by Bill Lodge's group. I don't know—I have a vague recollection that we even had a site or a blueprint or a drawing.

Q. All of that would presuppose that you weren't going to use Bartell's. A. We certainly weren't—now, my recollection isn't (131) clear enough. I know that we would have had to do an awful lot of work on it, but whether we planned to use his existing studio and transmitter site I can't remember specifically. I have a recollection that we weren't going to, but there was going to be a great big re-ordering.

Q. Even if you did use his, it would only be for a short time because you wouldn't be satisfied to stay with his? A. That's right. This is one of the disadvantages of a network going into UHF. We have to operate at a larger scale than a non-network.

Q. I would suggest to you this was one of the disadvantages of Columbia buying Bartell and not Poller. A. Well, if you are suggesting—well, take that out.

Q. Go ahead. A. Yes, I would say that if we didn't have this indication of the kind of price that Mr. Poller was asking for, and I should have said this a long time ago, it would have been much happier to deal with him. It would have been better, more convenient, and better for purposes of relationship, yes.

Q. And you would have had the equipment and studio that you wanted anyhow? (132) A. Yes according to some people here, no according to others. Some people preferred to start from scratch anyhow.

Q. There may have been some that didn't want you to buy a UHF station at all. A. I don't mean that. There were those who were opposed to my proposal to accept Lou's offer because they wanted to start from scratch. You will find that all the time, especially among the engineers, who want everything gold plated and just to their specifications, and we always have that fight.

Q. So that actually since you ultimately did acquire and you actually used, did you not, Poller's equipment and studio— A. To the best of my knowledge, we did. We certainly used—yes, we must have used his equipment. I think we added, but I'm not sure about it. I haven't followed it since then.

Q. Therefore, I suggest to you that that is one of the reasons why you should have wanted to buy WCAN instead of Bartell's. A. As I say, if this problem of price hadn't come up, sure.

Q. Yet you don't know to this day, do you, for what (133) price Poller really would have sold to you? A. In exact dollars?

Q. Yes. A. That's absolutely right; but in range we knew what he wanted.

Q. You had heard what he wanted? A. We knew what he wanted.

Q. He never told you what he wanted. A. Knew in terms of what a court would accept, no; knew in terms of the way we do business, which certainly is a reasonable way, yes, we knew.

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(136) Q. Do you think it adds to your power as a network that you have limited, to be sure, in number but selectivity is in your hands—the power to acquire a local station, even while you are affiliating or affiliated with a local station? A. Adds to our power?

Q. Yes.

Mr. Doskow: I object to that question unless you define power to do what.

Mr. Freedman: The objection is noted, of course.

Mr. Doskow: Then you won't define it?

A. I'd have an awful time answering that. Maybe this will satisfy you: It does create an additional risk in very isolated cases to which the affiliate is subject, that he wouldn't be subject to that particular risk if we had no power to acquire stations.

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(139) Q. Even after you bought Bartell's station in Milwaukee and cancelled Poller's affiliation agreement, do you think that caused any consternation or any anxiety among any of your other affiliates? A. I'm sorry, the question you asked before this wasn't fair of me to put it in the present tense. My answer was no, it doesn't enter anybody's mind because they know that now we are finished. Did it at the time, it may have. I just don't know, and I'll help you out on this. My recollection is that I may have heard one or two affiliates ask us about the stability in the market because to them (140) they had figured it might be a market that we would like to go into. I have a recollection sometime in the last five or six years when we still were short of our quota, of stations, affiliates coming in and saying, "Hey

there, there are rumors that you might be interested in buying in the market, or according to what we know, the kind of market you are interested in, we have figured out you might come into the market. Is there any truth to this and where do we stand?"

Now, I think that answers your question in terms of yes, there has been some sign of something more than curiosity. But it isn't quite as bad as you say it is.

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(143) Q. • • • Was it of any importance or interest to you whether Poller remained in business after he sold you his equipment? A. Yes.

Q. Why? A. I guess the best way I can put it is the way I put it to him. I said that I didn't want CBS or me to be in a position where we were acquiring one station and putting another off the air, and I told him I would not consider (144) buying his equipment unless I was sure, as sure as one could be—and I was sure, too, at the time he got finished with me—that there would be the same number of stations on the air after this whole thing was completed as there were before.

Q. Why did it make any difference to you? A. Because I didn't want us to be in the position as one of the proponents and champions of UHF of diminishing the number.

Q. What difference would that make to you? A. I wanted to avoid precisely the kind of criticism that was implicit in the questions you quite properly asked.

Q. That deals with the antitrust laws? A. No, no, no. That has nothing to do with the antitrust laws. Our standards of conduct. I would like to think they are the ones that I ask us to live by and have nothing to do with the antitrust laws; and they are four times as high, although that is a quantitative judgment I shouldn't make.

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(145) Q. Why don't you in your own way, without my asking you any specific questions, tell us what happened? Poller came to New York and you met him. He certainly acted swiftly and gave every evidence of concern. He was in New York the next day. A. On the 21st, I believe. Of course, I have to rely on memory, which I have tried to refresh since then.

I believe that it was Jack van Volkenburg that called me up and said that he had spoken to Lou and told him about this, and that Lou said he wanted to come in right away and see us. I don't know whether in that phone call Jack said—Jack van Volkenburg said, 'Come on in," or whether he asked me what to do and I said, "Tell him to come in." But in any event, he came in.

We set up a lunch on the day he came in, which was the next day after the notification, and I think it was October 22nd. Present at the lunch were Alec Rosenman, who was Lou Poller's national representative here in New York and I think had an interest in the station and whom I had known from the same case that I knew Thad Holt. He was involved in that case, too. I think Herb Akerberg (146) was at that lunch, and I have not, for the life of me, been able to ascertain from my recollection whether Jack van Volkenburg was there or not. I believe not, but I'm not sure.

At the lunch, Lou said—and I don't know whether these are his words, so I'll have to paraphrase—or the general impresion I got was that—

Q. Could I interrupt you at that point. Were there any memoranda made of the conversation of the meeting? A. No. He felt that we had let him down very badly. His argument was that he had spent a lot of money on equipment, studios, on building up his station as an affiliate of the CBS Television Network; that now we had gone elsewhere to buy a station and cancelled his affiliation. He was left stranded high and dry with something far beyond what

he could posibly need. He felt that we had dealt with him very badly.

Ambie is going to kill me for this. I felt sorry for him. I felt that while we had not acted improperly, no matter what the reasons were, here was a guy that poured his heart and his soul and his money—and his wife, I remember, whom I had met working at the station, too, and she was an awfully nice lady—and Alec Rosenman had some (147) money in this, and he was a nice guy. It was not the sort of thing you enjoy nor appreciate.

The conversation got around to first why didn't we buy from him, and I said—incidentally, he testified that I did most of the talking on behalf of CBS, and his recollection is quite right. I tried to explain to him why we felt that we were precluded from going to him on account of the price that we had heard—I'll call it heard now—he testified that I had mentioned Storer and that was where we got the price. I never even knew that Storer was in this, I think, until I read his testimony, and I checked. I explained to him why I had felt and we had felt that we were in a position, which you don't agree with, where we couldn't go forward with him. Then it went on—well, he didn't agree with that any more than you do, but the problem was what to do with it from there on in because it was something that was done.

He said that he had a theory that he could run a television equivalent of a music and news radio station, but all this equipment he had was not necesary. He wanted something that he could get at a much lower price because the revenues wouldn't be as high and so the cost shouldn't be as high, and he thought he could make a go of it. In (148) the course of that, the proposal came up for us to exchange equipment and for us to buy—pay for the difference in value between the equipment that would be turned over to him and the equipment that he would turn over to us. That was a new idea to me. Actually, I think that if I had been sensible and stopped to think, this would have

been a nice proposal for me to have made as a way out. I thought it was a pretty good idea and he thought it was a pretty good idea. I made the point, though, that I just wouldn't be—I didn't want us to be in a position of buying WOKY and then in effect buying his equipment so that he wouldn't be there, and that I wouldn't talk about it any further until and unless he really meant what he said about his plans to go ahead. He said he certainly did. He thought it could be done.

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(149) A. I thought that this was a sensible solution and I recommended it to Jack van Volkenburg. Maybe we went back to his office to discuss it. I don't remember with whom else I discussed it because I had no part in making the decision myself. But I thought it was a damn good idea.

And then I think we set up another meeting, and in the meantime we considered it further. I think we got some sort of list or some sort of inventory, or I think maybe we sent somebody out to have a look at what he had. We met about a week later to discuss it further.

At that subsequent meeting, we talked some more about the desirability of that way out and we talked some more—this fellow Blackburn was at that meeting, too; I don't know whether Mrs. Poller came in for a short time or not. We talked some more about his plans for running this operation and he said he thought it could be done, and I reiterated that I didn't want to consider it unless this was in his mind.

(150) Then we got down to talking about price. There was a point at which we had a caucus and decided that we would make a counter-offer, which was the amount that I think we felt he really wanted, that he was ready to settle for.

Q. He made a suggestion of price first? A. Yes.

Q. Then you made a counter-offer? A. No. Yes, we made a counter-offer and then we upped that. Then he proposed—we seemed to have a meeting of minds on that.

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(152) Q. By the way, do you know how Poller's equipment compared in quality and extent with Bartell's? A. Better and more.

Q. In fact, you were highly complimentary about his equipment, weren't you? A. Yes.

Q. And you thought he had acquired it skillfully and economically? A. He certainly did.

Q. And that was superior to what Bartells had? A. Oh, yes.

Q. Can you describe that to a layman in a general way, why it was better? (153) A. I'm a layman. There was more of it.

Q. You are less of a layman than a layman. A. He had a much better, spanking clean studio, which is important to us. Bartell had—

The Witness: Can you spell this?

A. (Continuing) "Schlock." You know, apparently he picked up stuff wherever he could. I don't remember how many cameras he had, but it wasn't many. And I'm not sure that he had bought those new. His transmitter and transmitter site was not even a satisfactory one.

Q. Go ahead. I am listening with the other ear. A. I'm finished.

Q. Can you tell us something about Poller's equipment? A. It was good, clean, first-rate equipment.

Q. How about the prices at which he had acquired much of it? A. He did a darn good job in getting things at a good price, as I recall.

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(154) Q. You didn't fix a time, did you, within which he had to go on the air again? A. Yes. We didn't fix a time, but that certainly was discussed. There was a long, long discusion about the crossover. There was some complication. My recollection is that—I think this was part of the discussion that—the Bartell transmitter or transmitter site was not satisfactory, as I remember.

Q. To you? A. Either to him or to us.

Q. Do you know why? A. No, I don't. I don't think I'll understand why anyhow. (155) My recollection is that —his transmitter—we were going to take over his transmitter at the Schroeder site, and maybe it was going to stay at the Schroeder, but one had to be put on top of the other. There was some discussion—this is relevant to your question of time—he said he wanted to go right on the air, but it turned out that because it's an engineering feat to switch from one transmitter to the other and turn them around and do whatever they were going to do, he would have to be off the air. He said he wanted to have the right of access before to work up to the top of the Schroeder to work out everything so that he could go on the air with the least possible delay. He said it was his objective to go —he said it would be impossible to go on the air the minute we took over, and he said what he wanted to do is do it within 24 hours. There was a lot of discussion by the engineers of how—our engineers had to work with his engineers to make this possible, and so on and so on and so on.

Q. And actually— A. I'll say—well, I didn't understand the technical problems there. They spent so much time talking about it that this confirmed my conviction that he was going on the air. I really thought he was going to stay on the air.

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(158) Q. Do you happen to know whether the rates at WOKY were increased after you went into operation? A. Yes.

Q. Can you tell us what you know about that? A. I just know that they went up.

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(174) Q. Will you tell me why it was important to you that NBC should not know that you were trying to acquire the UHF station? A. Yes. First, we don't like our competi-

tors to know what we are up to. Second, we had been advised, as I recollect, by our lawyers that we should avoid any appearance at all of a joint decision to go into the same market.

Q. By "joint decision" you mean joint with NBC? A. NBC, yes.

Q. If you didn't conceal the fact that you were trying to get into the UHF market in Milwaukee, that wouldn't (175) be a joint decision to enter the market, would it? A. I think the lawyers said just so there would be no question. If it did become public, it might give rise to some inference that we deliberately let it be known so that they would do the same thing, or deliberately let it be known so that we would do the same thing—if they let it be known. I'm hazy on this. This was a warning of the lawyers so that there could be absolutely no question that each of us was going our separate way.

(191) The Witness: Shall I go ahead with this examination before trial of my counsel?

But let me straighten something out. You asked me and I fumbled around early this morning about subsidiaries, which I think probably related to Columbia Television, Inc. Did it?

Mr. Freedman: Well, CBS-TV, Inc., yes.

The Witness: There is a wholly-owned subsidiary called Columbia Television, Inc., which was incorporated on February 17, 1949. It is an inactive subsidiary.

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(192) Mr. Doskow: Do you know whether Columbia Television, Inc., played any part at all in the negotiations for the Milwaukee station?

The Witness: Oh, no. I mean, the answer is, "Yes, I do know." It did not.

Mr. Doskow: Were all of those negotiations conducted on behalf of Columbia Broadcasting System, Inc., or the CBS Television Division?

The Witness: Yes.

Mr. Doskow: Did any of the subsidiaries of Columbia Broadcasting System, Inc., have anything to do with any aspect of the Milwaukee transaction?

The Witness: No.

Q. You mean none of the officials of CBS Television Division had anything to do with the acquisition of the Milwaukee station? A. No, I don't mean that.

Q. What then? A. He said did any of the subsidiaries.

Q. Yes. And in subsidiaries, you do not include divisions? A. That's correct.

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(193) Q. I don't know that you really made it clear, and I would like to recur to it in case you could clarify it, why you maintained divisions that were not incorporated in some cases and in effect divisions that were incorporated in other cases. A. The only divisions that were incorporated were the ones that came over as corporations and they remained as incorporated divisions for a while.

Q. And then what happened to them? A. Then they were dissolved and became nothing but divisions.

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PLAINTIFF'S EXHIBIT 1.

COLUMBIA BROADCASTING SYSTEM, INC.

Procedure of Appointment and Authorization of Division Executives

1. The Chairman of the Board or the President of the Corporation will determine the jurisdiction of each Division.

2. The President of each Division will be appointed by the Chairman of the Board or the President of the Corporation. The President of each Division shall have general charge and supervision of the operations of that Division.

3. The Vice Presidents of each Division will be appointed by the President of that Division, subject to the approval of the Chairman of the Board or the President of the Corporation.

4. The scope of authority of the individual Vice Presidents of each Division with respect to the operations of that Division will be determined by the President of that Division, subject to the approval of the Chairman of the Board or the President of the Corporation.

5. The jurisdiction of the Divisions, appointment of Division Presidents, and the approval of the appoint and scope of authority of Vice Presidents of the Divisions will be evidenced by memoranda from the Chairman of the Board or the President of the Corporation to the Presidents of the respective Divisions.

6. The appointment and scope of authority of the Vice Presidents of each Division will be evidenced by

memoranda from the President of that Division to the Vice President of that Division.

7. Contracts of each Division will be executed by (i) the President of the Division, (ii) the Vice President of the Division having authority over the subject matter of the contract, or (iii) such other person as may have been authorized in writing by the President of the Division to execute contracts of that kind.

August 8, 1951

PLAINTIFF'S EXHIBIT 2.

August 8, 1951

Mr. Stanton submitted to the meeting a copy of a memorandum entitled "Procedure on Appointment and Authorization of Division Executives" and stated that the procedure as outlined in that memorandum, with such changes as might appear to be desirable from time to time, would be followed in connection with the appointment and authorization of division executives. After discussion, on motion of Mr. Levy seconded by Mr. Bush, the procedure for the appointment and authorization of division executives as outlined in the memorandum submitted to the meeting was approved and the Chairman of the Board and the President were authorized to make, from time to time, such changes in such procedure as they deem desirable.

PLAINTIFF'S EXHIBIT 3.

COLUMBIA BROADCASTING SYSTEM, INC.
OFFICE COMMUNICATION

To Messrs. Bruce Coffin, Meighan,
Murphy, Van Volkenburg

From Mr. Stanton

Station .....

August 8, 1951

Attached is a memorandum entitled "Procedure on Appointment and Authorization of Division Executives." The procedure outlined in this memorandum will be followed in the case of the appointment of all Division executives.

Each of you is empowered to authorize specific individuals to execute contracts on behalf of your Division. Each such authorization should be in the form of a written memorandum. I believe that the number of authorized signatures should be kept at a minimum consistent with efficient operation. Each memorandum of authorization should clearly define the type of contracts which a particular individual is authorized to execute, and should contain such other limitations as you may deem desirable upon the authority of the individual.

Contracts of your respective Divisions should be signed as follows:

HYTRON RADIO & ELECTRONIC CO.
a division of
Columbia Broadcasting System, Inc.
by .....

CBS LABORATORIES DIVISION
Columbia Broadcasting System, Inc.
by .....

CBS RADIO DIVISION
Columbia Broadcasting System, Inc.
by .....

CBS TELEVISION DIVISION
Columbia Broadcasting System, Inc.
by .....

In each case, the individual executing the agreement should use his Division title.

I shall appreciate it if you will send a copy of each memorandum of appointment or authorization to me, to the Messrs. Ream and Brauner, and to the Senior Attorney of your Division.

F. S.

AFFIDAVIT OF LOU POLLER, PLAINTIFF, IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

Filed May 13, 1959.

WASHINGTON
DISTRICT OF COLUMBIA } ss.:

LOU POLLER, being duly sworn deposes and says:

I am the plaintiff in this action. I am making this affidavit in opposition to a motion for summary judgment filed on behalf of defendants CBS, J. L. Van Volkenburg and H. V. Akerberg.

I am the assignee and sole owner of all the assets of Midwest Broadcasting Company (Midwest) including the right of action set forth in the complaint. Midwest was a Wisconsin corporation which owned and, until February 25, 1955, operated in Milwaukee, WCAN-TV, a UHF television broadcasting station on Channel 25. Midwest had obtained its license from the Federal Communications Commission (FCC) in February, 1953. On August 21, 1953, Midwest made an affiliation agreement with CBS Television, and on September 5, 1953 began broadcasting as an affiliate of CBS Television.

When WCAN went on the air, there was only one other television station in operation in Milwaukee. That was WTMJ-TV, a VHF station owned and operated by the Milwaukee Journal, a local newspaper. It had commenced broadcasting in 1947 before the FCC imposed a "freeze" on applications for new television stations.

This "freeze" order had been issued by the FCC on September 30, 1948 to permit the formulation of rules and the allocation of channels in the announced interest of a "truly nationwide and competitive television system." Three years earlier, in its Report of May 25, 1945 (General

Allocations Proceedings, Docket No. 6651) making the first comprehensive allocation of VHF frequencies, the Commission had recognized that use of the UHF band was necessary to achieve that objective.

> "The Commission repeats the hope expressed in its proposed report that all persons interested in the future of television will undertake comprehensive and adequate experimentation in the upper portion of the spectrum. The importance of an adequate program of experimentation in this portion of the spectrum cannot be overemphasized, for *it is obvious from the allocations which the Commission is making for television below 300 megacycles* [i.e., in the VHF band] *that in the present state of the art the development of the upper portion of the spectrum* [i.e., in the UHF band] *is necessary for the establishment of a truly nationwide and competitive television system.*" (Emphasis added.)

The freeze lasted almost four years. On April 11, 1952, after protracted hearings and review of many comments from interested persons in the television industry, the FCC issued its "Sixth Report" and order lifting the freeze, effective July 1, 1952 (17 Fed. Reg. 3905).

Previously only twelve channels had been available for commercial television. These were in the VHF band. Under the new allocation plan seventy additional channels, in the UHF band, were assigned. In the Sixth Report, the FCC stated, in this connection:

> "67. The assignment plan for UHF was coordinated with and made complementary to the VHF assignment plan. The Commission has always recognized that even with an extensive scattering of VHF assignments, *the twelve channels available are not sufficient to meet the objective of providing television service to all the people. . . .*" (17 Fed. Reg. 3912) (Emphasis added.)

It was also recognized that UHF channels were necessary to permit effective competition in the industry and prevent undue concentration in the hands of a few. The FCC clearly stated:

> "197. Because television is in a stage of early development and the additional consideration that *the limited number of VHF channels will prevent a nationwide competitive television service from developing wholly within the VHF band,* we are convinced that the UHF band will be fully utilized and that UHF stations will *eventually* compete on a favorable basis with stations in VHF. In many cases UHF will carry the complete burden of providing television service, while *in other areas it will be essential for providing competitive service.* In view of these circumstances, we are convinced that stations in the UHF band will constitute an integral part of a single, nation-wide television service." (17 Fed. Reg. 3927) (Emphasis added.)

In 1954, CBS acknowledged, as "obvious", this conclusion that "the VHF band is not capable of providing a sufficient number of television broadcast channels to make possible nationwide competitive television broadcasting service" and recognized that "many communities are wholly dependent upon the UHF band for competitive local television service."[1]

As part of the Sixth Report there was assigned to Milwaukee, Wisconsin VHF Channels 4, 10 and 12 (with Channel 10 reserved for non-commercial, educational use), and UHF Channels 19, 25 and 31. As stated above, there was at that time only one television station in operation in Milwaukee. It was a VHF station, WTMJ-TV, operating on Channel 3. By this order its assignment was changed to Channel 4.

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1. Exhibit A attached hereto (p. 982). Entered in Hearings Before Potter Subcommittee on Communications, Senate Committee on Interstate and Foreign Commerce, 83rd Cong., 2d Sess. June 18, 1954 as "Exhibit I" to Statement of Dr. Frank Stanton.

In September, 1952, a few months after the freeze had been lifted, Midwest filed an application for Channel 12. Since there were other applicants for that channel, a hearing was necessary. To obviate the imminent delay in disposing of the applications for Channel 12 Midwest modified its application to seek Channel 25 in the UHF band.

At this time CBS Radio had an affiliation with radio station WISN operated by The Hearst Corporation, publisher of the Milwaukee Sentinel. The affiliation contract provided that if, as and when WISN was granted a television license for operation in Milwaukee, CBS Television would affiliate with it.[2] The Hearst Corporation did attempt to get a license, even to the extent of requesting that Channel 10, reserved for education, be released for commercial television and licensed to it. This effort was not successful. It had also tried, at first unsuccessfully, to have Channel 6 moved to Whitefish Bay (near Milwaukee) from Green Bay, Wisconsin. Ultimately, on December 3, 1953, Channel 6 was moved to Whitefish Bay (9 Pike & Fischer RR. 1383).

During the time that WTMJ was the only station in operation, it enjoyed an enviable position. It had a primary affiliation with NBC, and secondary affiliations with the three remaining networks, including CBS. This relationship continued until CBS made its affiliation with Midwest in August, 1953. While WTMJ was the only television station in Milwaukee, CBS had expressed concern about

2. Paragraph 7 of the agreement read as follows: "Columbia agrees that in the event it desires to offer television programs or program material or other programs or program material generally to television, short wave or ultra short wave stations, or to other stations not in the regular broadcast band, it will offer the same to any television, short wave or ultra short wave station, or other station not in the regular broadcast band, located in the city in which the Station is located, which may be owned by or affiliated with the Station before offering the same to any other such station located in the city in which the Station is located. The Station agrees that in the event it becomes the owner of or affiliated with any television, short wave or ultra short wave station, or other station not in the regular broadcast band, located in the city in which the Station is located, no arrangements shall be made involving the supplying to such station of television programs or program material or other programs or program material until Columbia shall have been advised of the terms of any such proposed arrangements and shall have been given a reasonable opportunity to enter similar arrangements with the station upon terms as favorable to Columbia."

the "monopoly" and the secondary position to which CBS was relegated in that city. The network had even negotiated with WTMJ to urge it to switch its affiliation to CBS Television from NBC but without success.

When I spoke to Richard Salant of CBS in 1953 he suggested that in order to relieve this situation I might bring an antitrust action against WTMJ charging it with monopolization of television facilities in Milwaukee. However, I did not do so.

As a result of considerable persuasion and negotiation CBS executed an affiliation agreement with WCAN-TV as of August 21, 1953. Although I was very eager to have a standard agreement for a term of two years subject to the usual notice of termination, I was confronted with an agreement modified to permit CBS to terminate it at anytime upon giving six months' notice and I was informed that that was the best I could get because WCAN was a UHF station. I was also informed that WCAN would not be a "must buy" or "basic required" station, and that we would have to go out and "peddle for ourselves".

In about January of 1954 I received an inquiry from Richard C. Crisler of Cincinnati who is a television and radio station broker. He informed me that he had a purchaser willing to buy WCAN-TV, and I told him that I would sell for $2,000,000. I sent him operating statements and other statistics concerning the station. In the course of one of our conversations, Mr. Crisler told me that his client was George Storer. He also informed me that Storer had indicated his willingness to pay the $2,000,000 I was asking as soon as the FCC adopted the proposed multiple ownership rule permitting a single owner to own five VHF and two UHF stations.

In February of 1954, the Subcommittee on Communications of the Senate Committee on Interstate and Foreign Commerce (frequently referred to as the "Potter Committee") announced that, beginning in April of 1954, it would

hold hearings on the status of UHF and multiple ownership of television stations. The hearings were held beginning May 19th. In April, I was invited by Mr. Storer to attend a meeting with Senator Potter to acquaint the Senator with some of the problems of television. The meeting consumed a substantial portion of the day and on several occasions Mr. Storer discussed the Milwaukee situation with me, assuring me that he wanted our station and would consummate the transaction as soon as the FCC adopted the new multiple ownership rule. In the course of the Potter hearings I again met and spoke with Mr. Storer in the same vein.

During these hearings Dr. Frank Stanton testified on behalf of CBS. In the course of his testimony on June 18, 1954 he made specific complimentary reference to WCAN-TV:[3]

> "Again, the testimony of the witnesses who have appeared before you establishes that these obstacles are not insuperable. You have heard some UHF operators tell you that they are in the black and have been almost from the first day of their operations. They have told you, and the known facts certainly bear them out, that within a relatively short time the job that they have done—vigorous, aggressive and in the best American tradition of courageous pioneering—has resulted in conversions by well over the majority of set owners in their areas. Their stories compel the conclusion that it is by no means necessarily fatal to be consigned to the UHF.
>
> "But when one analyzes the fact which the UHF witnesses have presented and the facts relating to similar situations, a pattern begins to emerge which seems to us to be almost inescapable. It is this: where there

3. Hearings Before the Subcommittee on Communications, Committee on Interstate and Foreign Commerce, United States Senate, 83rd Cong., 2d Sess., pp. 974-975.

has already been established a multiple VHF service in a community—at least 2 and certainly 3 or more VHF stations—the success of a new UHF station is exceedingly doubtful. On the other hand, where UHF comes in first with no existing VHF station in the community, in normal circumstances this station does well. The Portland, Oreg., and Peoria, Ill., UHF stations are examples of this. Further, where there is only one VHF service, even though it has been in the community for a considerable length of time, *a vigorously and aggressively managed new UHF station in that community can do well. Station WCAN-TV, a UHF station in Milwaukee, is an example of this.*

"But even in cases similar to Portland, Peoria and Milwaukee, we know also that unless there has been very substantial conversion, the future of a UHF station which, after its establishment, then has to meet the competition of new VHF stations in the same city, is speculative although not by any means and in all circumstances hopeless." (Emphasis added.)

On May 14, 1954, while the hearings were in progress, four applicants for the second commercial VHF channel in Milwaukee—Channel 12—merged. The application was granted on June 11, 1954 and Channel 12, with the call letters WTVW, was assigned to Milwaukee Area Telecasting Corp.

While the Channel 12 proceedings were pending in the spring of 1954 I spoke to Mr. Akerberg and expressed concern about the possibility of CBS switching its affiliation from us, at WCAN, to Channel 12. He informed me of his opinion that CBS' best interest would be served by continuing its affiliation with WCAN and that he would so recommend to the company.

On August 24, 1954 it was announced that WTVW had become affiliated with ABC and DuMont and would go on

the air in October. It commenced broadcasting on October 27, 1954.

After public announcement had been made of this affiliation, and the 5 and 2 rule had been adopted, I wrote to Dr. Stanton on September 20, 1954 to express my appreciation for CBS' retaining my affiliation.[4] At the same time I advised him that if CBS wanted to acquire WCAN I would deal with them voluntarily. I also gave him additional information about our new construction and promotional activities. By Dr. Stanton's reply on September 23rd,[5] I was lulled into a feeling of security from a CBS acquisition: "We see no likelihood of an interest on our part in the acquisition of the station." However, within a month thereafter CBS cancelled the affiliation with WCAN —because CBS had decided to buy my competitor, WOKY-TV.[6]

During the entire period since going on the air we had kept CBS fully advised of all our activities, plans and progress. I had undertaken a considerable program of expansion of facilities, of which I kept them completely informed, and I was encouraged by CBS Television to continue these activities. I was also encouraged by CBS and CBS Television not to be stampeded into selling the station. Mr. Akerberg, who knew of the interest which Mr. Storer had expressed in acquiring our station, stated to me that I should not feel myself under any obligation to sell WCAN to anyone.

One of the immediate results of the CBS acquisition and operation of WOKY was an increase in the rates to advertisers. As of October 10, 1954 the basic (gross) rate charged by WOKY for Class "A" television time was $400 per hour.[7] This rate continued until February 20, 1955, the

4. Poller Deposition, Exhibit D-5.
5. Poller Deposition, Exhibit D-6.
6. Station WOKY-TV was owned by Bartell Broadcasters, Inc., which still owns radio stations in five large markets.
7. Class "A" time consisted of the hours between 6:00 P. M. and 11:00 P. M. daily; 12:00 noon to 11:00 P. M. Saturday and Sunday. See Exhibit B. Excerpt, Standard Rate and Data Service, October 10, 1954, pp. 275 and 276 (Milwaukee, Wisconsin).

effective date of the first rate announced for Station WXIX, as the station was known after the CBS acquisition.[8] The new rate was $700 per hour for Class "AA" time (6:30 P. M. to 10:00 P. M. daily)—an increase of $300 per hour.

The new rate was even higher than any ever charged by WCAN. As of October 10, 1954, the rate for Class "A" time on WCAN (6:00 P. M. to 11:00 P. M. Monday through Saturday; 5:00 P. M. to 11:00 P. M. Sunday) was $500 per hour.[9] Early in October WCAN had announced that effective November 1, 1954 the rate would be $600 per hour. But under the usual "six months' protection" clause that charge did not apply to advertising schedules on the air at the time the increase was announced until six months after the effective date.[10] To all intents and purposes, therefore, this $600 rate for WCAN never went into effect, and the rate for Class "A" time on WCAN was only $500 until WCAN ceased operations. The new WXIX rate was therefore $200 in excess of the applicable WCAN rate.

According to a memorandum in the CBS files Mr. Lodge, the Chief Engineer of CBS Television had "suggested" this rate increase to Mr. Scoville (CBS Television's midwest manager of station relations) as early as October 22, 1954.[11] This was only *one day* after our affiliation was cancelled, and *three days before* the option to buy WOKY was exercised.

On October 26, 1954 the "Rate Committee" of CBS Television recommended to Van Volkenburg in a confidential memorandum that the rate for WOKY-TV start at $700 per hour.[12]

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8. See Exhibit C. Excerpt, Standard Rate and Data Service, February 10, 1955, pp. 285 and 286 (Milwaukee, Wisconsin).

9. See Exhibit B.

10. See Exhibit B.

11. Produced to my counsel and attached hereto as Exhibit D. In December, 1953 when CBS was considering areas where it might acquire UHF channels, it was already anticipating that the "card rate" would be increased to $1,000 per hour. Exhibit E. Memorandum, Lodge to Van Volkenburg, December 28, 1953.

12. Exhibit F.

Reference to the published rate schedules demonstrates that the evening hours included in the "option time" provision of the standard affiliation agreement between CBS Television and its affiliates (7:30 P. M. to 10:30 P. M.) comprise the prime hours of the day for which the highest rates are charged.

The relationship of WCAN to CBS Television as an affiliate was such that we, like all the other affiliates, were under constant pressure to carry the maximum amount of the network program lest the affiliation be cancelled and transferred to a station showing a greater willingness to carry network programs. One of the incentives which I offered to induce CBS to affiliate with WCAN was the assurance that CBS would obtain a substantially greater showing in Milwaukee than it was getting from WTMJ. During the entire time of the WCAN affiliation I continued to demonstrate a very keen loyalty to CBS Television. For example, the FCC prepared and submitted to the Potter Committee a table showing that during the week of March 14 to 20, 1954 in "mixed" markets (i.e., having both VHF and UHF stations) WCAN-TV carried more CBS network hours than any UHF station in the country.[13] Another table demonstrated that of five CBS network hours among the "top 10" programs we carried four, or eighty per cent.[14] In mixed markets the only one other UHF station in the country (WNOK, Columbia, S. C.) carried as much.

Statistics furnished by CBS to the FCC network study group demonstrate that of 68 disaffiliations between January, 1952 and August, 1956, twenty-four (or about thirty-five per cent) were for the reason (inter alia) that the affiliate was primarily interested in carrying NBC programs.[15]

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13. Exhibit G. Table 11, Hearings Before Subcommittee on Communications Committee on Interstate and Foreign Commerce, U. S. Senate, 83rd Cong., 2d Sess., p. 163.

14. Exhibit H. Table 11-A, Hearings Before Subcommittee on Communications Committee on Interstate and Foreign Commerce, U. S. Senate, 83rd Cong., 2d Sess., p. 164.

15. Exhibit I. Reasons for CBS disaffiliations January, 1952-August, 1956.

The possibility of disaffiliation was one of the compelling reasons for my accepting the very substantial portion of the network program which I did, including some programs I might not otherwise have carried.

As of October, 1954, the CBS Television network comprised 127 stations, of which 46 were "basic required" or "must buy" stations. This included all of the CBS owned and operated stations. It did not include WCAN-TV. By 1956 this number had increased to 52.

In his affidavit (at pp. 9-10) Mr. Salant referred to "studies" made by CBS Television in 1955. These were cited by CBS in a memorandum submitted on June 12, 1956 to the Senate Committee on Interstate and Foreign Commerce ("Magnuson Committee"), 84th Cong., 2d Sess. entitled "Memorandum Concerning the Applicability of the Antitrust Laws to the Television Broadcast Activities of Columbia Broadcasting System, Inc." (at p. 1938).

In that same memorandum (at p. 1936) a very significant statement is made as to the nature of the CBS "must buy" or "basic required" stations:

> "The CBS Television network designates certain of its affiliates (currently 52) as 'basic-required' stations. Those stations cover substantially all the major markets in the United States, and 81.8% of American television homes. With a few exceptions arising out of special circumstances and the special needs of network advertisers *the effect of the basic-required list is to require advertisers who wish to use the network to order those stations as a minimum.* With one exception, there is no agreement between the CBS Television network and the stations involved by which they are designated as basic-required. *CBS is free to, and does, alter the list at will.*"

On November 27, 1958 CBS announced to its affiliates that effective March 1, 1959, it would no longer pursue the "must buy" policy, but would instead require a "minimum

buy" by which network advertisers would be obliged to contract for a minimum amount of *dollars* of advertising if they desire to have any network advertising at all.

On January 7, 1959 NBC also announced abandonment of its "must buy" policy, effective March 15, 1959, and institution of a "minimum buy" plan. ABC has enforced a "minimum buy" for some time.

It is evident, therefore, that under the "must buy" policy both the advertiser and the station were at the mercy of the network. If an advertiser wished to use the network *at all* he was compelled to use *all* the "basic required" stations, or he could use none. Of course this was of tremendous advantage to the stations included in the list. However, those stations had no assurance whatsoever that they would remain on the list, for "CBS is free to, and does, alter the list at will."

Immediately upon CBS' commencement of its operation of Station WXIX-TV, Milwaukee became a "must buy" or "basic required" market on the CBS Television network, though WCAN-TV had always been only a "basic optional" station.

It was, therefore, imperative for any advertiser desiring to purchase time on the network that he purchase time on WXIX.

As a consequence, many local advertisers who had formerly been able to purchase time and had purchased time during my operation of the station were unable to obtain assurances from CBS Television that time would still be available to them, and in any event it was made clear that the acquisition by CBS would involve new rates. My efforts to obtain such assurances were unavailing. A letter from Craig Lawrence, Director of Station Administration of CBS Television [16] illustrates the difficulty encountered. It demonstrates further how little concern the "absentee owner" had for local advertisers.

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16. Exhibit J. Letter, December 27, 1954, Craig Lawrence to Lou Poller.

Another immediate consequence of the CBS transactions upon which this action is predicated is that there was in Milwaukee only one UHF station in operation, whereas three had been assigned and two had actually been operating before CBS decided to buy. This foreseeable result was one of the basic grounds for the dissent of two Commissioners (Hennock and Bartley) from the action of the other three Commissioners in approving the transaction.[17]

Commissioner Hennock, one of the dissenting Commissioners, had also dissented from the order approving the "5 and 2" rule fixing 7 as the maximum number of stations which multiple owners might own, no more than 5 of which could be in the VHF band.[18] The rule had been proposed "in order to encourage the rapid and effective development of the UHF band" (FCC Docket 10822, December 24, 1953, 18 Fed. Reg. 8904). However, the consequences of this acquisition were far from encouraging—either in Milwaukee or throughout the country.

Since adoption of the 5 and 2 rule the number of UHF stations has gradually but consistently decreased, though VHF stations have increased. A table submitted to the Magnuson Committee by the FCC on July 24, 1956 [19] demonstrates a drop in the number of UHF stations on the air from a high of 121 on December 31, 1953 to 94 on June 30, 1956.

Table 1 of the FCC report on TV Broadcast financial data for 1957 (released August 27, 1958) shows that the number of UHF stations on the air had decreased to 88 at the end of 1957.[20]

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17. Exhibit K. FCC Report No. 2617 on CBS acquisition on WOKY-TV. I am informed by my counsel that the mere fact of FCC approval does not insulate this transaction from application of the antitrust laws. The FCC has taken the position that it is not its function "to apply the antitrust laws as such". See exchange of correspondence between Chairman George C. McConnaughey and Senator Warren G. Magnuson, Chairman of the Senate Committee on Interstate and Foreign Commerce attached as Exhibit L.

18. Exhibit M. FCC Docket 10822, September 17, 1954.

19. Exhibit N. Table "Number of Post-freeze TV stations in operation, July, 1952-June, 1956", Hearings, Senate Committee on Interstate and Foreign Commerce, 84th Cong., 2d Sess., Part II (p. 1044).

20. Exhibit O.

As of November 16, 1958, when CBS closed WHCT-TV in Hartford, Connecticut, the number was further reduced to 84.

Among the UHF stations which have ceased operations or whose closing has been definitely announced, at least 4 were owned and operated by "substantial" multiple owners. Two had been owned by Storer Broadcasting Co.: WGBS-TV in Miami, Florida, closed April 13, 1957; and KPTV-TV in Portland, Oregon, closed April 30, 1957. Another was station WBUF-TV in Buffalo, New York, formerly operated by NBC, but closed on October 1, 1958. A fourth is CBS' station WHCT-TV in Hartford, the closing of which was announced on October 9, 1958 and became effective November 16, 1958.

These UHF acquisitions have been cited, in the congressional hearings, as evidence of the multiple owners' interest in "encouraging" UHF.[21]

Storer's KPTV in Portland had been an NBC affiliate. The day after it went off the air as a UHF station it went back on the air as a VHF with the same NBC affiliation. On the date that NBC's own WBUF in Buffalo went off the air, the NBC affiliation went to WGR-TV, a VHF station. When CBS announced that it would close WHCT-TV in Hartford, it made a simultaneous announcement of an affiliation with PTJC-TV a VHF station.

Now that Mr. Storer has obtained approval of his acquisition of WITI-TV, a VHF station in Milwaukee, the demise of CBS' station WXIX in Milwaukee and a switch of the CBS affiliation to Storer's WITI appears imminent.

Thus, as early as January 26, 1954 when Sidney Alexander of CBS Television submitted a memorandum on "Relative Attractiveness of a UHF Station in Various Leading Markets"[22] he observed (p. 9):

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21. See, for example, Exhibit A, at p. 983.

22. Exhibit P. Memorandum, January 26, 1954, Sidney Alexander (CBS Television) on "Relative Attractiveness of a UHF Station in Various Leading Markets".

"The fact that CBS programming is already working to build up UHF population in the Milwaukee and New Haven-Hartford markets is an important consideration. There would be no short-term loss to the network in continuing to give the support of CBS programming to the build up of a UHF population in these areas, *at least until more VHF stations come in. The cost to the network of relying upon an owned UHF station in Milwaukee will become significant only when an additional VHF station appears there.* . . ."

At that time there was only one VHF station in Milwaukee, as a primary affiliate of NBC. By October, 1954, a second VHF station went on the air. CBS permitted it to become a primary affiliate of ABC. With Storer's advent as the third VHF station the "cost to the network of relying upon an owned UHF station in Milwaukee" has *really* "become significant."

The profitable operation that Milwaukee had in 1954 under my management was *immediately* converted to a losing operation under CBS' management. In 1955, the first year of CBS' operation, CBS reported a loss of $129,642 for Station WXIX.[23]

This loss occurred at a time when income from CBS' other owned and operated stations was increasing over what it had been in 1954,[24] and the overall income of the entire CBS network was considerably increased over that of the preceding year.[25]

According to the FCC report for the fiscal year 1956 (p. 122):

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23. Exhibit Q. "Broadcast Income before Federal tax for network owned stations, 1955" from Report of Antitrust Subcommittee ("Celler Subcommittee") of the House Committee on the Judiciary, 85th Cong., 1st Sess., p. 31.

24. Exhibit R. "Broadcast Income before Federal tax for network owned stations, 1954" from Report of Antitrust Subcommittee ("Celler Subcommittee") of the House Committee on the Judiciary, 85th Cong., 1st Sess., p. 32.

25. Exhibit S. "Broadcast income (before Federal income tax) of 4 TV networks" from Report of Antitrust Subcommittee ("Celler Subcommittee") of the House Committee on the Judiciary, 85th Cong., 1st Sess., p. 28.

"Total radio and TV profits of 196.2 million in 1955 were 48% above 1954. *Television broadcast profits of 180.2 million were 66% higher* and radio profits of 46.0 million were 10% higher." (Emphasis added.)

The tables prepared by the FCC to illustrate this data are appended hereto."[26]

The record of these tables reveals that *the income of television networks in 1955 was 66.5% higher* than for the preceding year of 1954.

The change in the UHF operation in Milwaukee from a profitable one when operated under independent management to an unprofitable one under network ownership and management is particularly striking in the general atmosphere of the upward trend of all the other operations of CBS Television and the industry as a whole.

At this time the three networks controlled 69.9% of the national television advertising market. CBS and NBC together controlled 68.1% of the total national spot and network time sales as owners of stations and sales agents for other stations, CBS itself controlling 33.4% of that total. With respect to network times sales (exclusive of national spot sales) the CBS-NBC total was 89%, and CBS alone controlled 46.5%."[27]

Though considerable emphasis is placed upon the asserted competition between CBS and NBC, the fact is that the nature of the medium and the development of the industry has enabled these networks to pursue a policy of "live and let live", since there is enough business and enough of an audience to "go around". Merely by reason of the *ownership* of their respective stations each network is in a

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26. Exhibit T. "Comparative Financial Data for Radio and Television Broadcast Industries 1954 and 1955" from FCC Annual Report for Fiscal Year, 1956, p. 122.

27. Exhibit U. "Proportions of National Spot and Network Time Sales controlled by networks as owners of stations and sales agents for other stations, 1955" from Report of House Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., p. 189 ("Harris Report").

position to guarantee to prospective advertisers access to markets containing a substantial national audience, and from CBS' own studies, as reported in the Salant affidavit (p. 9), for the year 1955:

> ". . . of the 50 largest CBS Television network customers, *76% also advertise on at least one other television network, and 58% are among the 50 largest customers* of at least one other television network." (Emphasis added.)

The foregoing circumstances demonstrate how sharply developments in the television industry have departed from the enunciated policy of the FCC "against the monopolization of broadcast facilities and the preservation of our broadcasting system on a free competitive basis."[28]

LOU POLLER

Sworn to and subscribed before me this day of , A. D., 1959.

Notary Public.

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28. Exhibit V. FCC Report and Order, November 25, 1953, Docket No. 8967, p. 5, on Adoption of Multiple Ownership Rules.

EXHIBIT A TO POLLER AFFIDAVIT.

EXHIBIT I

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

Docket No. 10822

In the Matter of Amendment of Section 3.636 of The Commissions' Rules and Regulations relating to multiple ownership of television broadcast stations

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STATEMENT OF COLUMBIA BROADCASTING SYSTEM, INC.

Columbia Broadcasting System, Inc., hereinafter called CBS, favors the amendment of Section 3.636 of the Commission's Rules and Regulations relating to multiple ownership of television broadcast stations as proposed by the Commission. CBS suggests that the rule be amended to provide for a greater increase in the maximum permissible ownership of television stations.

The principal reasons that CBS supports the proposed amendment of rule and suggests more liberalization are as follows:

1. CBS believes that it is in the public interest to impose as few restrictions as possible on the ownership of broadcast stations.

2. Increased utilization of UHF stations will make possible the maximum competition between television broadcast stations.

3. Ownership of UHF stations by broadcasters of proven experience and ability should promote development of the UHF service.

Relaxation of restriction on ownership

CBS does not believe it is appropriate to argue here the desirability or undesirability of imposing a numerical limitation upon the number of television broadcast stations which may be owned by any person. The Commission resolved that question in its Report and Order released November 27, 1953, in Docket No. 8967.

CBS has advocated consistently, and will continue to advocate, that it is in the public interest for ownership of broadcast stations, both radio and television, to be subject to as few restrictions as possible. It bases its advocacy upon the conviction that, except for regulations required by the nature of broadcasting, broadcasters should not be limited by governmental action in their ability to compete with newspapers, magazines and other media which are competitors for advertising revenue.

CBS believes that no business operation can remain healthy and dynamic if it is prevented from growing. This belief leads inevitably to the conclusion that any numerical limitation upon ownership of broadcast stations should be imposed only with the greatest of reluctance and that the maximum number of stations which may be owned should be as large as possible.

Accordingly, to the extent that the proposed amendment relaxes the numerical limitation upon ownership of stations CBS supports that amendment.

Maximum utilization of the UHF band should increase competition

It has long been obvious, and the Commission recognized in its Sixth Report and Order, that the VHF band is not capable of providing a sufficient number of television broadcast channels to make possible nationwide competitive television broadcasting service. That this is so is readily

apparent from Exhibit A attached. In addition, many communities are wholly dependent upon the UHF band for competitive local television service—and in some cases for their only television service.

Ownership of UHF stations by experienced broadcasters will promote growth of that service

The acceptance and success of any broadcast service is dependent upon a number of factors, among the most important of which are the programs furnished by that service and the impetus given to development of that service by the willingness of the leaders of the industry to participate in its development.

At the present time the potentialities of VHF can be predicted with a fair degree of certainty. It is an established service with an established audience in many areas. Its programs can be received on all outstanding receivers without conversion or adaptation.

The UHF television broadcast service, on the other hand, is, by comparison a service whose ultimate potentialities can be realized only through practical operating experience. It is estimated that as of November 1, 1953, approximately 25,725,000 of the approximately 27,500,000 television families in this country have television sets which are unable to receive UHF. The sets of these families can be adapted to receive UHF service only at a conversion cost of $20 or more per set.

In addition, while most models of sets currently being produced are available in models which will receive both UHF and VHF, there is a significant price differential ($25 or more) between a set capable of receiving VHF only and a set of the same model capable of receiving both VHF and UHF.

Accordingly, it is only natural that persons having a choice between operating a VHF and a UHF station would select the former.

For that reason an amendment of the present multiple-ownership rule which permits ownership of UHF stations in addition to the maximum permissible ownership of VHF stations should encourage the operation of UHF stations by established broadcasters—broadcasters who have a wealth of actual operating experience and program know-how. It would enable such broadcasters to operate UHF stations without reducing the number of VHF stations they may have.

CBS believes that its experience in the operation of radio and television broadcasting and its attention to the development and production of radio and television programs have given it preeminence in the program field. Its stations have been uniformly successful in producing high quality programs which have won wide public acceptance. It believes that the experience of other multiple owners have enabled them to produce high quality programing.

Insofar as networks are concerned, it is only natural that their economic interests should impel them at the present time to seek VHF affiliates in markets having both VHF and UHF stations. On the other hand, if a network is the licensee of a UHF station in a combination UHF and VHF market its economic interest would impel it to make its own station the network outlet in that city. Hence, that UHF station would receive the benefit of both superior local programs and popular network programs.

In the event that the rule is amended, as suggested, or to permit even greater ownership of UHF, the programing of UHF stations should attract larger audiences for those stations.

Furthermore, in addition to the program know-how of multiple owners, such owners ordinarily have resources to enable them to staff the UHF stations with exceedingly competent technical personnel. Many of them also have reservoirs of highly-trained engineering personnel. Such personnel should insure that the maximum technical potentiality for UHF stations owned by them and thus encour-

age ownership of receivers capable of receiving UHF signals.

In addition, the mere fact that multiple owners of television stations are willing to invest funds, time, and energy in the operation of UHF stations should foster confidence in UHF on the part of others and thus increase the number of UHF stations.

With an increase in the number of UHF stations in operation and with assured high quality programing for many of such stations, it is natural to expect that a greater number of present sets will be converted so that they may receive UHF and that the number of purchasers of new sets capable of receiving UHF will be increased. As the production of sets capable of receiving UHF is increased, it is only reasonable to expect a reduction in the price differential between such sets and VHF-only sets. Such reduction should have a cumulative effect in giving additional impetus to the purchase of UHF sets.

Further relaxation of rule

As pointed out above, CBS advocates the minimum restriction on ownership of television stations. It believes that the benefits which would flow from modification of the rule as proposed by the Commission would be increased if the limitation on the maximum ownership of stations were also increased. In view of the present limitations upon the coverage of UHF stations and in view of the aggregate number of commercial television assignments, it would seem that no undue concentration of control of television broadcasting would result from limiting maximum ownership to 10 television broadcast stations, no more than 5 of which may be in the VHF band. As appears from exhibit A, attached, an aggregate of 6 or more commercial television channels have been assigned to each of 12 of the first 20 cities in order of size and an aggregate of 5 commercial television channels have been assigned to each of 8 of such cities.

Ownership and operation of UHF stations by CBS

In view of the present relative status of VHF and UHF, CBS, as a corporation, believes that its obligation to stockholders requires that it seek to own the maximum possible number of VHF stations.

However, if it is permitted to operate UHF stations in addition to the maximum permissible number of VHF stations, CBS is willing and eager to do so.

It believes that its technical and program experience and personnel make it highly qualified to do so. It further believes that its programing will spur the industry to high program standards and also believes that its engineering experience and personnel will attain the maximum technical performance of UHF.

It also believes that its position of leadership in the industry, its willingness to invest in and to operate UHF stations will provide an inducement to others to do so.

Need for modification of footnote 10

The willingness of CBS to apply for authorization to operate UHF stations is qualified by its desire to own the maximum permissible number of VHF stations. Accordingly, in the event that the rule is amended to permit ownership of UHF stations in addition to the maximum permissible number of VHF stations, provision should be made to permit CBS and others similarly situated to apply for and own UHF stations and, at the same time, to prosecute present applications for VHF facilities to the same extent as is now permitted under footnote 10 to the Commission's Report and Order in Docket No. 8967.

Respectfully submitted.

COLUMBIA BROADCASTING SYSTEM, INC.,

By JULIUS F. BRAUNER,
Secretary and General Attorney.

JANUARY 29, 1954.

48550—54—63

EXHIBIT "D" TO POLLER AFFIDAVIT.

Mr. Scovill cc: Mr. Shurick
Dr. Eisenberg
Mr. Lodge Mr. Davis

October 22, 1954

SUBJECT: WOKY-TV—MILWAUKEE

This is in response to your telephone request for a rate recommendation for WOKY-TV, Milwaukee.

It is my understanding that WOKY-TV is not yet operating at its full authorized power. Nevertheless, for all practical purposes, I believe it can be presumed to serve substantially the same number of homes as WCAN-TV. On this score, the April ARB reception study showed 57.4% of the TV homes able to receive Channel 25 (WCAN-TV) and 55.6% able to receive Channel 19 (WOKY-TV)—a difference of only 1.8 perecentage points. And though our plans are not yet formalized, I feel sure that every effort will be made to expedite a power increase for WOKY-TV.

It is, therefore, my suggestion that the rate of WOKY-TV be made the same as that currently charged for WCAN-TV ($700 per Class A hour, which became effective on October 1). It may reasonably be presumed that within the next six months, the coverage of WOKY-TV can be made to approximate that of WCAN-TV, that UHF conversions in the Milwaukee area will continue to be made, and that the $700 rate can be justified.

EXHIBIT "E" TO POLLER AFFIDAVIT.

CBS TELEVISION

Office Communication

to: Mr. Van Volkenburg cc: Messrs. Stanton
Salant

from: Mr. Lodge

December 28, 1953

In a telephone conversation with Mr. Stanton, I supplemented my memorandum of December 21, concerning possible C-O UHF cities, by a specific recommendation that we consider Milwaukee and Buffalo the two most desirable markets. Each of these cities in its central area accounts for more than 400,000 homes and, with full UHF conversion, would justify a card rate approximating $1,000 per hour under our present rate curve.

Present experience with UHF indicates that it could, technically, serve the important central "core" of Buffalo and Milwaukee, with outlying areas served from Rochester and possibly Erie (in the case of Buffalo) and Chicago, Rockford and Madison (in the case of Milwaukee).

I am extremely worried about UHF's abiilty to serve important suburban edges of the largest (say the first ten) cities. Hence my backing off to the two smaller, but still attractive markets listed above. The problem involves as much human reaction as engineering, however, since with expense and effort by the set owner, the UHF signal can be brought into most homes satisfactorily. But if outdoor antennas are barred (most common in large-city apartments) or if the distance from UHF transmitter to populous suburb is more than 20 miles, the VHF—UHF differences seem to be exaggerated.

EXHIBIT "F" TO POLLER AFFIDAVIT.

CBS TELEVISION

cc: Messrs. Akerberg
Brauner
Dawson
Eisenberg
Fagan
Hylan
Jamieson
Jones
Kats
Lodge
Salant
Scovill
Wood

Office Communication

to: Mr. Von Volkenburg

from: Mr. Shurick

October 26, 1954

CONFIDENTIAL

Re: Recommended rate for WOKY-TV, Milwaukee, Wisconsin

The Rate Committee recommends that the rate for WOKY-TV, Milwaukee start at $700 (gross hour night), a rate only recently announced for WCAN-TV effective October 1, 1954 with six months' protection.

While WOKY-TV is only operating on 18.2 kw visual power (WCAN-TV operating on 21.2 kw), the effective coverage area of the two stations in terms of unduplicated television families is reasonably the same.

Within the next six months the move of our entire network schedule from WCAN-TV to WOKY-TV should have been completed. This together with improved facilities planned by us for WOKY-TV should justify a rate increase effective on or about April 1, 1955—at the end of the protection period for the new rate granted WCAN-TV on October 1.

DS

ds

EXCERPT FROM EXHIBIT "P" TO POLLER AFFIDAVIT.

January 26, 1954

RELATIVE ATTRACTIVENESS OF A UHF STATION IN VARIOUS LEADING MARKETS

Summary

If the FCC should permit a single entity to own two UHF television stations as well as five VHF stations, the most attractive markets in which CBS might seek UHF stations would be Pittsburgh, St. Louis, New Haven-Hartford, and Milwaukee, in that order. Of course, a VHF station in any of those markets would be preferable to a UHF unless it should knock out the possibility of an advantageous acquisition of a VHF station in Philadelphia, Boston, Detroit, or San Francisco. A VHF station in Cleveland, Washington, or Baltimore would also appear to be more attractive than a UHF station in Milwaukee.

Philadelphia, Boston, and Detroit, each of which has over 1,000,000 families within fifty miles radius, and over 800,000 families closer than to any other significant station point,[1] will ultimately be more attractive locations for a UHF station than Pittsburgh, St. Louis, New Haven-Hartford, or Milwaukee. But at present, Philadelphia, Boston, and Detroit are such firmly established VHF markets that it would be wiser to choose UHF stations where the short run chances for UHF seem more favorable. At some time in the very distant future it may pay to sell the UHF stations first chosen and acquire UHF stations in two of the three markets, Philadelphia, Detroit, and Boston.

1. In this context a "significant" station-point is a station-point at which it can reasonably be presumed the network will have an affiliate. Thus, for Philadelphia, New York City and Reading, Pennsylvania would be significant station-points while Wilmington, Trenton, and New Brunswick are not so considered.

There are about 800,000 families within fifty miles of Pittsburgh, and of these about 640,000 are closer to Pittsburgh than to any other significant station-point. St. Louis has about 620,000 families within a fifty mile radius, all of which are closer to St. Louis than to any other significant station-point. Pittsburgh, with Irwin, is scheduled ultimately to have three commercial VHF and three UHF stations, and St. Louis three VHF and four UHF, counting Belleville, Illinois.

New Haven-Hartford, and Milwaukee are somewhat smaller markets with 578,000 families and 419,000 families respectively within a fifty mile circle not closer to other significant station-points. They share with Pittsburgh and St. Louis the characteristic of being at present single station markets, so that the prospects for rapid conversion to UHF are good. Furthermore New Haven-Hartford has an advantage over Pittsburgh and St. Louis in that there will eventually be only two VHF stations in that market in contrast with three each in the larger cities.

Though New Haven-Hartford has a significantly larger population within fifty miles and not closer to other significant station-points than does Milwaukee, it may not actually be more attractive than Milwaukee because its market is divided up into a number of metropolitan centers. Its local advertising potential, therefore, cannot be expected to be as large as that of Milwaukee. This consideration is probably counterbalanced, at least in the short run, by the fact that the other metropolitan areas in the New Haven-Hartford area will also have UHF stations, and so will strengthen the incentive toward conversion to UHF in that area.

Minneapolis-St. Paul, Kansas City, and Buffalo are markets which have ultimate UHF potentials fairly close to those of Milwaukee though smaller than Pittsburgh, St. Louis or New Haven-Hartford. They suffer other disabilities, however. Minneapolis-St. Paul and Kansas City already have two VHF stations each, and CBS should be at no

disadvantages in getting its network programs cleared there. Although Buffalo has only one VHF station now, CBS' network access to Buffalo is good. Minneapolis-St. Paul will eventually have four VHF stations, and so is less attractive for UHF than some of the other markets of similar size.

Of course, some of these considerations depend upon fairly temporary circumstances and corresponding adjustments must be made as these circumstances change.

The most attractive UHF-only markets are Youngstown, Ohio and Scranton-Wilkes-Barre, Pennsylvania (or Hazleton), with realistic potentials [1] of about 300,000 families each, followed by Harrisburg, Pennsylvania, South Bend or Fort Wayne, Indiana, with realistic potentials of 180,000 to 280,000 families. The entrance of CBS into these markets as a station-owner would, however, be contrary to the spirit of the proposed FCC rule, and furthermore the markets seem clearly less attractive than the mixed VHF-UHF markets named above.

Basic Considerations

There are three different sorts of markets in which CBS might consider seeking UHF stations.

1. Markets that are primarily UHF.
2. Mixed UHF-VHF markets in which VHF is not yet fully established.
3. Mixed UHF-VHF markets in which VHF is firmly established.

It would be easiest, subject to FCC permission, to establish profitable stations in markets of the first type. Such stations would, however, be less profitable in the long run than the most attractive stations in the second group, and

1. A realistic potential represents my judgment of the families in a station-point's fifty mile radius not likely to be lost to other significant station-points.

those less profitable than the best stations in the third group. A fundamental decision is accordingly required as to the degree of short-term cost and inconvenience that is to be undergone in order to obtain the eventual gain. The spirit of the FCC rule would, of course, best be served by giving greater weight to long-term than to short-term considerations.

VHF-ONLY Markets

In Table 1 are shown various measures of the coverage potential of a UHF station in each of a few of the most attractive UHF-only markets. Many station-points to which only UHF stations have been assigned were excluded from consideration here because they fell in markets which were mixed UHF-VHF. These station-points, such as Waterbury or New Britain, Connecticut will be considered below in mixed VHF-UHF markets.

The total number of homes within fifty miles is a poor measure of each station's potential coverage because a substantial number of such homes may frequently be within range of a usable signal from a VHF station in an important metropolitan area. The "realistic potential" within fifty miles has been estimated on the basis of a number of considerations, frequently involving arbitrary judgments. In general, the figure can be described as the total number of homes within fifty miles after deducting those homes which are also within fifty miles of an outlying major VHF station, or are closer to another significant station-point, i.e., one that might reasonably be considered for CBS affiliation, and so might cut into the circulation potential of the station being analyzed.

These general rules were not applied hard and fast, however. For example, 91,000 families that are just barely within fifty miles of Pittsburgh, Wheeling, or Cleveland, but within twenty-five miles of Youngstown have been included in Youngstown's realistic potential. The 300,000 realistic potential for Scranton-Wilkes-Barre would be reduced to

218,000 if Hazleton, Pennsylvania were to be considered a "significant" station-point. These examples should suffice to indicate that the realistic potentials depend upon a number of specific assumptions, and different figures could be obtained by making different assumptions. The total number of families within twenty-five miles may be regarded as a conservative lower limit of the coverage that could be expected of stations at these points.

There were not many attractive UHF-only station-points. Youngstown, Ohio clearly led the list. It appears from the table that Wilkes-Barre-Scranton is equally attractive, although that conclusion is subject to some uncertainty arising from the possible competition from outlying stations, principally the one at Hazleton. Harrisburg, Pennsylvania, third on the list, is also subject to a good deal of uncertainty depending on the competition of outlying station-points. More detailed investigation might reveal that the realistic potential of South Bend and Fort Wayne may be subject to some revision. The terrain in their areas is such as possibly to permit good coverage over a radius greater than the fifty miles that has been allowed. This would broaden their potential markets, but might also permit Chicago's VHF stations to cut into South Bend's market to a greater extent than has been allowed.

It may roughly be estimated that a CBS-owned station at Youngstown, Ohio or at Wilkes-Barre-Scranton (or Hazleton) might ultimately gross from $800,000 to $1,500,000 a year, at Harrisburg, Fort Wayne or South Bend, possibly $700,000 to $1,000,000. It could fairly confidently be expected that such earnings could be attained within a couple of years of commencement of operation.

Mixed UHF-VHF Areas Where VHF is Not Yet Fully Established

Table 2 shows various measures of the coverage potential of a station in each of the country's leading markets. In this table "realistic potential" is defined as the number

of families within fifty miles of the station-point and closer to the station-point than to any other significant station. In the case of UHF-only station-points realistic potential also excludes those families within fifty miles of an outlying major VHF station-point unless they fall very close to the UHF station-point. While the concept of realistic potential seems fairly well suited to the evaluation of the relative attractiveness of various markets from the point of view of an owned UHF station, it must be recognized that it would not necessarily be the appropriate concept for the evaluation of a VHF station.

Thus, a VHF station in Philadelphia might lay claim to cover a market of 1.7 million families. About 1.5 million of these live within fifty miles of Philadelphia as shown in the third column of Table 2. Of these some 0.4 million families may actually be closer to outlying significant stations such as Reading and Baltimore. The remaining 1.1 million families within fifty miles and closer than to any other significant station-point constitute Philadelphia's "realistic potential". One peculiarity of this measure, though not a significant one quantitatively, is that counties that are equidistant from two significant stations are assigned to neither's realistic potential.

The measure of potential labelled "cumulative contribution" indicates the number of families that this station would add to the total within fifty miles of a network composed of stations higher on the list. The difference between a station-point's cumulative contribution and the total number of families within fifty miles is accordingly the number of families in that stations area that are within fifty miles of some station or stations higher on the list.

The interrelationship of the three measures can be most vividly illustrated by Providence, Rhode Island. There are about 1,300,000 families within fifty miles of Providence. About 370,000 of these may be considered Providence's "realistic potential", the rest being closer to other significant station-points, principally Boston. Provi-

dence adds only 130,000 families to the total within fifty miles of a network that includes Boston, and only 75,000 to a network that includes Boston and New Haven.

We may eliminate or postpone consideration of the first seven markets in Table 2. CBS already owns stations in the first three, and pre-freeze VHF stations are firmly consolidated in each of the next four. The operation of a UHF station in Philadelphia, Boston, Detroit, or San Francisco would probably be unattractive in the immediate future, subject to qualifications made in the next section. This leaves Pittsburgh and St. Louis as the most clearly attractive markets for UHF stations, provided it is not possible to obtain VHF stations there. Of course, the Pittsburgh figure may be subject to some downward adjustment on considerations of terrain.

Further down the list special interest also attaches to New Haven-Hartford-Waterbury-New Britain-Springfield, and to Milwaukee, Cleveland, Baltimore, and Washington can probably be eliminated from consideration on the same basis as Philadelphia, Boston, and Detroit, namely that the two or more existing VHF stations in each are so well established in delivering a variety of programs as to render difficult the entrance of a UHF station.

On the other hand, New Haven-Hartford and Milwaukee are still single station markets so far as VHF is concerned. It may accordingly be presumed that UHF has specially good short-term prospects in these areas. Set owners will undoubtedly want the extra variety afforded by more than one station. The force of this argument is indicated by the fact that in these areas the UHF set populations is already reaching respectable proportions. There are already claimed to be over 190,000 UHF sets in the Milwaukee area and over 110,000 in the New Haven-Hartford-New Britain area.

New Haven-Hartford has the further advantage, for UHF, of having only two VHF's assigned to the area as compared with three for Milwaukee (including Whitefish

Bay) and at least three for almost all other markets of nearly comparable size. New Haven-Hartford is, however, subject to the disadvantage that its markets are distributed in several different metropolitan areas and a station so located cannot be expected to get local advertising revenues comparable to one of equal coverage in a single metropolitan area. But each of the centers of population in the New Haven-Hartford area will have its own UHF station, so giving additional incentive to the building of a UHF population.

The fact that CBS programing is already working to build up UHF set population in the Milwaukee and New Haven-Hartford markets is an important consideration. There would be no short-term loss to the network in continuing to give the support of CBS programing to the buildup of a UHF population in these areas, at least until more VHF stations come in. The cost to the network of relying upon an owned UHF station in Milwaukee will become significant only when an additional VHF station appears there. In New Haven the situation is somewhat more complicated.

Similar considerations would make Buffalo and possibly Norfolk attractive to NBC, although Buffalo, having three VHP stations allocated, is somewhat less attractive than New Haven-Hartford with only two. Norfolk is quite a way down the list.

After Milwaukee a large number of possibilities arise, none of which seems to be outstandingly attractive. The Seattle-Tacoma market has five VHF stations allocated, and so is not a likely prospect for UHF. In Cincinnati VHF is too well entrenched. San Jose is probably dominated by San Francisco, Dallas is complicated by Fort Worth, Providence by Boston, Houston by Galveston.

These last three station-points might, however, be given further study if Pittsburgh, St. Louis, New Haven, and Milwaukee should be eliminated from consideration. Subject to the findings of a more detailed study, and ab-

stracting from present network affiliations, it would appear that Kansas City and Buffalo were next most attactive, followed by Minneapolis-St. Paul (four VHF stations, however) and possibly by Houston. As one goes down the list one rapidly approaches station-points whose realistic potentials do not significantly exceed those of the leading UHF-only station points considered above, namely Youngstown and Scranton-Wilkes-Barre.

Portland, Oregon already has a good start in UHF with 128,000 UHF sets already claimed. But it is a considerably smaller market than Pittsburgh, St. Louis, Buffalo, New Haven-Hartford, or Milwaukee which are also well started in UHF.

I should expect a CBS-owned UHF station in Pittsburgh or St. Louis to earn revenues ultimately in excess of $2.5 million. One in New Haven or Milwaukee should ultimately earn about $2 million revenue.

It should be noted that the above estimates of ultimate revenues of stations in various markets are based only on the number of homes within fifty miles of the station. If improvements are eventually made in the generation, transmission, and reception of UHF signals so that greater distances can be reached with a satisfactory signal, the values of some of the stations considered would be significantly increased by the added coverage. Such additional coverage would unfortunately be most desirable in one of the most rugged areas, that around Pittsburgh.

Areas in Which VHF Is Fully Established

As shown in Table 2, Philadelphia, Boston, San Francisco and Detroit are the most important areas in which CBS does not own a station. We may limit our discussion principally to Philadelphia, Boston, and Detroit, since San Francisco seems fairly obviously unsuited to VHF, and smaller markets in this group would be clearly inferior to Pittsburgh or St. Louis. It may be worth dis-

cussing the possibility of a UHF station in one of these three markets even in spite of the obvious difficulties of getting a UHF foothold in them, since each of these markets has from 25% to 80% more families than St. Louis or Pittsburgh.

One possibility that might be considered would be to acquire a UHF station in one of these markets and during the period when the UHF set population is being built up to depend upon outlying VHF stations affiliated with CBS to feed CBS programs into the market. In certain cases, this would of course require making new affiliates and strengthening the outlying affiliates, but such strengthening would probably be worth-while to all parties concerned because of the considerable short-term advantages involved.

From this point of view Boston offers some attractive possibilities. The network could probably cover the entire Boston area from a full power station in Providence plus a station at or near full power in Manchester, New Hampshire, with some help from a UHF station in Western Massachusetts. Of course, to the extent the network programs were successfully being fed to the Boston area from VHF stations outside the area, there would be just that much less incentive to convert to UHF in Boston.

It might be possible to carry on a similar operation in the Detroit area with VHF stations at Flint and Toledo possibly covering the Detroit area so that the CBS programs could be received, though the quality of reception would probably be poor enough to encourage conversion to UHF in the Detroit area. A corresponding operation might be attempted in the Philadelphia area by affiliating with the Wilmington station and having that station take on full power.

These possibilities are somewhat farfetched, however, and it would certainly seem more sensible in the immediate future to try UHF station in St. Louis and Pittsburgh if VHF stations cannot be obtained in those cities, and in Milwaukee and the New Haven-Hartford area if VHF sta-

tions can be obtained in Pittsburgh and St. Louis. In the absence of payvision, there will almost certainly not be room for profitable operation of all three UHF stations allocated to Philadelphia nor of all three in Boston nor of the two in Detroit. Consequently, if at any time in the future, operation of a CBS affiliated UHF station in Philadelphia, Boston, or Detroit should seem attractive, it should be possible to enter one of those markets through purchase of a UHF station at substantially the cost of facilities. It therefore seems to make a lot more sense to try immediately to get UHF stations in the two highest ranking markets of the second group in which a VHF station cannot be acquired.

SUPPLEMENTAL AFFIDAVIT OF LOU POLLER, PLAINTIFF, IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

Filed May 13, 1959.

DADE COUNTY
STATE OF FLORIDA } ss.:

LOU POLLER, being duly sworn, deposes and says:

I am the plaintiff in this action. On February 26, 1959, I executed an affidavit in opposition to a motion for summary judgment filed on behalf of defendants CBS, J. L. Van Volkenburg and H. V. Akerberg.

On page 16 of the affidavit I stated:

> "Now that Mr. Storer has obtained approval of his acquisition of WITI-TV, a VHF station in Milwaukee, the demise of CBS' station WXIX in Milwaukee and a switch of the CBS affiliation to Storer's WITI appears imminent."

The following day, on February 27, CBS announced that its Milwaukee UHF station, WXIX, would be closed, effective March 31, 1959, and that CBS would affiliate with Storer's Milwaukee VHF station, WITI, effective April 1. Accordingly on March 31, 1959, Station WXIX was closed, and the affiliation with Storer became effective on April 1. In the meantime, by agreement dated March 27, 1959, CBS contracted to sell to WXIX, Inc., a newly formed corporation, the WXIX license and equipment, and to assign to it all of CBS' rights under its lease and other contracts. The consideration for the transaction was $50,000.

These actions which I had predicted, were merely the inevitable conclusion of the course of conduct upon which the defendants had embarked early in 1954 in their campaign to destroy UHF.

On the same day as the CBS announcements, February 27, in response to the request of the FCC for "a formal opinion of the Attorney General on the applicability of the antitrust laws to the option time practice" Judge Victor R. Hansen, the Assistant Attorney General in Charge of the Antitrust Division of the Department of Justice wrote a letter in which he advised the FCC, *inter alia*:

> "Viewed either as an 'exclusive dealing' or 'tying' device, the Commission's own findings require the conclusion that option time runs afoul of the Sherman Act."

The letter from the Attorney General's office is reported at 18 Pike & Fischer, Radio Regulation 1802 and the request therefor from the FCC is reported at 18 Pike & Fischer, Radio Regulation 1809. For the convenience of the Court, both communications are attached hereto as Exhibit "W".

LOU POLLER
Lou Poller

Sworn to and subscribed before me this 8th day of May, A. D. 1959.

ANN M. BROWN,
Notary Public.

(SEAL)

Notary Public, State of Florida at large
My commission expires June 20, 1960
Bonded by American Surety Co. of N. Y.

EXCERPTS FROM OFFICIAL TRANSCRIPT.

(Vol. 2, June 3, 1959.)

• • •

(6)* So, for the first time, on October 21st, around (7) there, according to the affidavit of Mr. Bartell, he learned for the first time that CBS was coming into Milwaukee. At that time he was bound by an option.

Now, in order for him to be a conspirator, under the cases, he would have to have some knowledge that there was a conspiracy, that there was some conspiracy afoot.

The Court: Well, conspiracy is just a disagreeable term for an agreement, for an illegal agreement.

Mr. Rosenman: That is right.

He never knew anything about this, he never knew anything about this until——

The Court: I think that might give rise to a question of fact. If the case hinged on that, I should be disinclined to grant summary judgment.

• • •

(28) The Court: What do you claim is the monopoly? I think that is something that has to be clarified.

Mr. Freedman: Yes. I have tried to sketch the facts.

The Court: But I would like to get your thought crystallized. What is the monopoly that you charge here?

Mr. Freedman: We charge that there can be a natural monopoly of the exhibition and the broadcasting of programs over a chain of stations and that it is no less a monopoly because at the same time there can be another chain which is doing the same thing when, because of physical law, the one cannot interfere with the other.

In other words, if I am broadcasting a program on my chain of stations at 10 o'clock today it is no less a monopoly of that airwave all over the United States because some-

* Figures in parentheses refer to page numbers of typewritten transcript.

wheres parallel there is another monopoly which mine can't air-wave-wise interfere with or take over.

The Court: Well, if that is so, then every railroad is a monopoly, is it not, the telegraph company is a monopoly?

(29) Mr. Freedman: It might well be.

Now, I say that you can have a monopoly geographically, although it doesn't spread all over the United States, and you therefore can have a monopoly all over the United States in certain channels of the airwaves when they are insulated from all other channels at the same time.

The Court: But I would like to be precise. What do you contend is monopolized here? In other words, I would like to know whether your charge is that this series of contracts is a violation of Section 1 of the Sherman Act or whether it is a violation of Section 2 relating to monopoly.

Mr. Freedman: We claim it is both.

The Court: I am not going to ask you about your claim under Section 1 at this time, but under Section 2 what do you claim is being monopolized?

Mr. Freedman: UHF in Milwaukee. CBS monopolized the growing UHF in Milwaukee.

Now I must add one more stone in the edifice of background.

The Court: Just a moment, before you proceed. Your contention is that the monopoly consisted—all I am interested in knowing is what the contention is, I am not trying to prejudge it—your contention is that the (30) monopoly so far as this case is concerned consisted in the attempt of CBS to monopolize UHF in Milwaukee?

Mr. Freedman: Right.

The Court: Very well. That clarifies my thinking.

Mr. Freedman: First, I should say before that, precedent to that, is my point that they had monopoly power

generally over a whole string, that they used that monopoly power to monopolize UHF in Milwaukee.

Why did they want to monopolize UHF in Milwaukee? To destroy it because of their enormous investments in VHF which would be rendered useless if UHF prospered. They therefore chose Milwaukee and went there because Poller, the plaintiff in this case, was the outstanding illustration of success in the emerging UHF industry, and by going there they destroyed him. By destroying him they gave notice to every independent operator in the United States, "If you lift your hand in favor of UHF, be careful, you too may be struck down as we struck Poller down."

Now, then, by stifling UHF in Milwaukee, therefore, they killed it in the country.

Salant himself said in his deposition that if UHF failed when Columbia was running it, it would be the kiss of death. And I must say their affection destroyed it.

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(34) That brings me to my last point, which is the parties to the conspiracy. We have discussed the matter very fully in our brief. My friend says Thad Holt was an agent.

The Court: I might suggest that you need not labor that point because I am not going to decide this case on what is more or less of a technicality. I am going to assume that Thad Holt was an independent person.

Mr. Freedman: And if I may——

The Court: And not merely a salaried employee of——

(35) Mr. Freedman: He says he wasn't an agent.

For the interest that it has, I would like to say a word about an unincorporated division, if your Honor would like to hear me on that. It is true if we have two conspirators we don't have to worry about the third. But

this is a matter of great interest, I think your Honor will be interested in it.

They create divisions in Columbia based on economic fact. They had a radio division. When TV began to expand they then split the radio division into a separate TV division.

The Court: Well, is it not the same sort of thing as General Motors having a Chevrolet division and a Cadillac division?

Mr. Freedman: Yes.

The Court: It is all General Motors, it is all one corporation, and I doubt very much whether you could sue the Chevrolet division as a separate entity.

Mr. Freedman: Well, I won't argue with your Honor except to say this——

The Court: No, I am not deciding anything about that. But under the antitrust law an unincorporated association may be sued in its common name as though it were an entity, but it must be an association with members. Now, a labor union is an association with members; that is (36) the Coronado case.

Mr. Freedman: I am speaking, though, now, aside from that. I am speaking aside from that. It is clear that a corporation and a corporate subsidiary can be guilty of conspiracy.

The Court: But I think this is all academic so far as this case is concerned. If you wish to argue, while I will be glad to hear you, I indicated Holt is an independent actor and, therefore, I am not going to decide this case on a point of that kind which, after all, would be a technicality, and I am not going to decide any major case or a minor case either on technicalities. That has always been one of my endeavors, not to let anybody's substantial rights be determined by technicalities.

Mr. Freedman: I will not trespass on your Honor's hospitality, however enticing the academic question may be, but I would like to conclude by this observation. We are here on a motion for summary judgment. I think one would almost believe that this was a motion for judgment n.o.v. after the verdict. There has been no trial. Depositions have been taken. My friends make some complaint of it in their briefs. They are necessarily framentary.

The Court: I am going to assume the facts to be as claimed by the plaintiff for the purposes of this motion.

Mr. Freedman: In essence, therefore, our claim (37) is that in its narrowest sense they won Poller's station and they got it cheap by doing what they did. In its wider sense—and that alone would be enough—in its wider sense they wanted Poller's station because they wanted to wipe out the most outstanding UHF operator in the country and by wiping him out they destroyed the UHF industry, which was a threat to them, despite their protestations, because of the enormous economic investment they had in VHF.

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The Court: I would like to ask you a question. I am not sure that the question is relevant, but it is in my mind.

Why did the Columbia Broadcasting Company, if it wanted to buy a UHF station in Milwaukee, why did it not buy the plaintiff's station, because the plaintiff was their affiliate, but instead of that cancel the affiliation contract and bought another station and thereby no doubt (38) depreciated the value of plaintiff's station?

It may be damnum absque injuria, but it did it.

Mr. Rosenman: There is no question that it did it. It had the right to disaffiliate, your Honor, exactly, and pick the station that it wanted.

The reason that it did not consult with the plaintiff was that there were statements in the market that the plaintiff wanted two million dollars for the station. That two

million dollars was, of course, dependent upon an affiliation. When he was dealing—and we have to assume the fact to be so even though we dispute it—when he was dealing with Mr. Storer on the basis of two million dollars it was on the basis that this affiliation would continue; otherwise it wouldn't be worth anything like that.

If we bought that station we would be owning that station, there wouldn't be any affiliation. And the price that we had heard that Poller wanted—and there is no question about that—was two million dollars.

Now, what is there in the antitrust laws, your Honor, which compels us to buy a station for two million dollars when we can buy a station more cheaply?

The Court: That is a different point. I am not now inquiring about the legality of that.

Mr. Rosenman: The reason they did not want to go in and try to beat this plaintiff down, as Mr. Salant (39) said, was that this was a policy which CBS has, a policy which I think and I think your Honor will agree is one of sound public relations. Here is an affiliate. Owning a station means that you cancel the affiliation, you now own the station. And they have adopted a policy that if they want to buy an affiliate station they will buy it at the price requested or they won't buy it. And the proof of it is Philadelphia, as my friend has stated.

The Court: You know, I am not impressed by that argument. Let us assume that they did not want to pay the price of two million dollars, I think they had a right to feel that that was too much, but that is no reason for not asking the plaintiff how much he would take for the station.

Mr. Rosenman: Well, it may be that your Honor does not agree with that corporate policy, but that is the policy of the corporation.

The Court: It is hard trading, is it not? Well, I am not asking you to commit yourself.

Mr. Rosenman: It may not be hard trading, sir. It may have been easier trading to go in and say what do you want, but it is a policy which is carried out consistently and so stated under oath. And Mr. Freedman pointed to another case where they did it, namely, where WCAU in Philadelphia was involved they did it.

This is a policy of the corporation, sir, and it (40) may be sound, it may be unsound, but what I want to impress upon you, as I am sure you understand, this is a question of Section 1 and Section 2.

The Court: I understand.

Mr. Rosenman: And whether your Honor agrees with the policy or not, I respectfully submit it has nothing to do with the question of monopoly or conspiracy.

The Court: It might have something to do with the equities if this was an application that was addressed to the discretion of the Court.

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(41) Mr. Rosenman: . . . Now, the one thing that concerns me, sir, is your Honor's statement that you are not going to decide this on a technical thing and that perhaps conspiracy may be technical.

(42) The Court: Conspiracy is not technical, but I am not going to decide this matter on the technical aspect of conspiracy, namely, whether Thad Holt was your employee or whether he was an independent actor, because if that was the violation in this case I would deny the motion for summary judgment because that would be an issue of fact.

Mr. Rosenman: Let me say to your Honor take either one. Take either one. We are trying to avoid any issue of fact. Take either one, whether——

The Court: This is, after all, a side issue and I am not going to decide it on that side issue.

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Mr. Rosenman: . . . Leaving Section 1 and going to Section 2, and I (43) will be very brief here, your Honor had the same difficulty in finding out what was the market of monopoly that I had and I think your Honor will have it——

The Court: Well, we know now what the claim is.

Mr. Rosenman: The claim seems to be two, as Mr. Freedman stated——

The Court: UHF in Milwaukee, is the way the Court construed it.

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OPINION OF THE COURT.

(46) The Court: This is an action to recover triple damages for violations of the antitrust laws. The action is before this Court at this time on defendants' motion for summary judgment.

The suit is predicated both on Section 1 of the Sherman Act, which proscribes unreasonable restraints of trade, and Section 2 of the statute, which bans monopolies and attempts to monopolize.

The plaintiff is the assignee of the owner of a television station that was operating in the City of Milwaukee under the call letters of WCAN. It was a UHF station. The plaintiff claims that as a result of activities which it is asserted were in violation of the Sherman Act the defendant, Columbia Broadcasting System, Inc., practically destroyed the value of the plaintiff's station.

It must be borne in mind at the outset that the issues presented in an action brought by a private individual for triple damages caused by violations of the antitrust laws are entirely different from those in an action brought by the United States to enjoin such violations. In a private action it is not sufficient to show violations of the anti-trust laws committed by the defendant. That is all that (47) the government need show in an action brought by the United States. In a private action, however, it is essential for the plaintiff to show that such violations resulted in an injury to the plaintiff.

The facts are not in dispute so far as their salient features are concerned, and insofar as there is any difference in the approach or inferences to be drawn from the facts the Court necessarily will construe them most favorably towards the plaintiff since it is the defendants who move for summary judgment.

The defendant, Columbia Broadcasting System, Inc., generally known as CBS, is a business concern that produces

shows or programs to be broadcast by individual television stations. It distributes its shows or programs among numerous television stations throughout the United States, making a contract with each of such stations known as an affiliation contract, by which it undertakes to supply material for the station for broadcasting and the station in turn undertakes to allocate a certain amount of time for the production of such programs.

In this instance, the plaintiff's station, WCAN, had an affiliation contract with the principal defendant, Columbia Broadcasting System, Inc. This affiliation contract, as was true with many other such contracts, contained a provision reserving to CBS the right to cancel at the end (48) of any six months' period. In other words, CBS could cut off the affiliation of the station on six months' notice at any time.

The plaintiff's station was a UHF station. There was at the time in question another UHF station operating in Milwaukee. Under the then existing rules of the Federal Communications Commission a broadcasting corporation such as CBS was not permitted to become the owner of more than five television stations. The rule was modified so as to permit each television broadcasting corporation, in addition to owning five VHF stations, also to acquire not more than two UHF stations. When that rule became effective or was about to become effective, CBS determined to acquire a UHF station in Milwaukee. Instead of, however, acquiring the plaintiff's station it decided to acquire his competitor's station, WOKY. It did so by procuring an option on WOKY through an intermediary, so that the owner of WOKY was not aware that the real purchaser was CBS.

Having procured this option, CBS then cancelled the affiliation contract with the plaintiff's station, taking advantage of the six months' provision.

Obviously the cancellation of the affiliation contract seriously injured the plaintiff and greatly reduced the value of his station.

The basic question in this action is, however, (49) whether this injury is damnum absque injuria or whether it was caused by any violation of the antitrust laws.

It is claimed that certain uniform provisions that were inserted in the affiliation contracts generally by CBS known as contracts providing for option time and similar provisions constitute illegal restraints of trade in violation of Section 1 of the Sherman Act. It is also claimed that as a result of the transaction just described CBS acquired a monopoly of UHF in Milwaukee in violation of Section 2 of the Act.

The view that this Court takes of the issues in this case makes it unnecessary to determine whether the challenged clauses in the affiliation contracts constitute a violation of the Sherman Act or whether a monopoly was created or existed in this instance. The question to be determined in this litigation is a much narrower one, namely, whether anything that the defendant did in respect to the plaintiff constituted a violation of either Section 1 or Section 2 of the Sherman Act.

To repeat, what the plaintiff complains of is that when the defendant desired to purchase a UHF station in Milwaukee it failed to purchase his station but purchased his competitor's station, and, further, that it cancelled his affiliation contract, as it had a right to do under the six months' provision.

(50) We must approach this question from the general principle that any person has a right to buy or sell from or to whom he chooses and he may deal or refuse to deal with anyone that he selects, provided he does not enter into an illegal conspiracy with someone else to exclude another person from the channels of trade. The leading case on this point is United States v. Colgate & Company, 250 United States 300. This case was but recently followed in this District in Orbo Theatre Corp. v. Loew's Incorporated, 156 F. Supp. 770-779.

Consequently, the defendant was entirely within its rights in choosing to buy the competing station. It was also exercising its contract right to cancel the plaintiff's affiliation.

The Court is of the opinion that this case is governed by the case of Packard Motor Car Company v. Webster Motor Car Company, 243 Fed. 2d 418, 100 Appeals D. C. 161. That case involved an automobile manufacturer who had several dealers selling the manufacturer's cars in the City of Baltimore. Each of the dealers had a contract or franchise, as it was known, the term of which was only one year. The plaintiff in that action was one of the dealers in question. One of the plaintiff's competitors came to the manfacturer and stated that he would not continue as a dealer unless the manufacturer agreed not to renew the plaintiff's franchise (51) and to grant an exclusive agency to him. The manufacturer came to the conclusion that the plaintiff was less important to him than his competitor and accordingly declined to renew the plaintiff's franchise. Plaintiff brought suit for triple damages, alleging that the transaction constituted a conspiracy in restraint of trade in violation of the Sherman Antitrust Act. The Court of Appeals for this Circuit held otherwise and reached the conclusion that the manufacturer was exercising his rights as a businessman.

A precisely similar situation was presented in a case decided in the Fourth Circuit, Schwing Motor Company v. Hudson Sales Corporation, 138 Fed. Supp. 899, affirmed 239 Fed. 2d 176.

In both cases applications were made to the Supreme Court for writs of certiorari but were denied.

So in the case at bar the defendant chose to exercise the option that the affiliation contract reserved to it of cancelling it on six months' notice. The defendant chose to buy a competing station instead of buying the plaintiff's station. While there is no doubt that considerable financial hardship must have resulted to the plaintiff, nevertheless

the Court is of the opinion that such hardship constitutes damnum absque injuria. If the defendant had been violating the Sherman Act, either as to Section 1 or Section 2, which the Court is not deciding and in respect (52) to which it is making no intimation, such alleged violations did not result in the damage that the plaintiff sustained. The plaintiff's loss resulted from the exercise by the defendant of the defendant's legal rights.

The Court concludes that the plaintiff is not entitled to recover and the defendant's motion for summary judgment is granted.

You may submit an appropriate order.

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ORDER GRANTING SUMMARY JUDGMENT AND ENTERING FINAL JUDGMENT IN FAVOR OF DEFENDANTS.

Dated June 9, 1959.

This cause having come on to be heard on the motion of defendants, Columbia Broadcasting System, Inc., J. L. Van Volkenburg and H. V. Akerberg, for summary judgment dismissing the complaint pursuant to Rule 56 of the Federal Rules of Civil Procedure, and it appearing to the Court from the affidavits, depositions and interrogatories filed in the proceedings, and from the pleadings, that said defendants are entitled to judgment as a matter of law, it is

ORDERED that said defendants' motion for summary judgment is in all respects granted, and it is further

ORDERED that final judgment be entered in favor of said defendants dismissing the complaint herein, with costs. Dated: June 9, 1959.

ALEXANDER HOLTZOFF,
United States District Judge.

NOTICE OF APPEAL.

Filed June 30, 1959.

Notice is hereby given that Lou Poller plaintiff above named, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the order granting defendants' motion for summary judgment and the final judgment entered in this action on June 9, 1959.

GEORGE R. BENEMAN,
1632 K Street, N. W.,
Washington 6, D. C.,
Attorney for Plaintiff.

Of Counsel:

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ORDER EXTENDING TIME.

Filed July 28, 1959.

Counsel for the parties defendant and the plaintiff having requested the Court under Rule 73(g) of the Federal Rules of Civil Procedure to extend the time for the filing of the record on appeal and docketing the appeal in the above-entitled cause, and it appearing that the Notice of Appeal was filed herein on June 30, 1959, and that this request is timely under said Rule, it is this 28th day of July, 1959

ORDERED: That the time for filing the record on appeal and docketing the appeal in the above-entitled cause be and the same hereby is extended to September 28, 1959.

/Sgd/ GEORGE L. HART, JR.,
Judge.

We Consent:

WM. MONTGOMERY SMITH,
Wm. Montgomery Smith,
Attorney of Plaintiff.

(Sgd) LEON R. BROOKS,
Leon R. Brooks,
Attorney for Defendants Columbia Broadcasting System, Inc., J. L. Van Volkenburg and H. V. Akerberg.

[fol. 290] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 15,379

LOU POLLER, Appellant,

v.

COLUMBIA BROADCASTING SYSTEM, INC., et al., Appellees.

Appeal From the United States District Court
for the District of Columbia

OPINION—Decided November 10, 1960

Mr. Abraham L. Freedman, of the bar of the Supreme Court of Pennsylvania, pro hac vice, by special leave of court, with whom Mr. George R. Beneman was on the brief, for appellant. Mr. Wm. Montgomery Smith also entered an appearance for appellant.

Mr. Samuel I. Rosenman, of the bar of the Court of Appeals of New York, pro hac vice, by special leave of court, with whom Mr. Leon R. Brooks was on the brief, for appellees.

Before Wilbur K. Miller, Chief Judge, and Prettyman and Washington, Circuit Judges.

WILBUR K. MILLER, *Chief Judge*: This is a civil suit for threefold damages under Section 4 of the Clayton Act brought by the appellant, Lou Poller, against the appellee, Columbia Broadcasting System, and others. He [fol. 291] charged them with combining and conspiring to restrain trade and commerce in the television industry in violation of Section 1 of the Sherman Act, and with monopolizing and attempting to monopolize trade and commerce in that industry in violation of Section 2 of the Sherman Act, and alleged he had thereby been injured in his business and property.

Poller sued as assignee of Midwest Broadcasting Company, a dissolved corporation of which he had been president and in which he had been the dominant figure. Midwest had been the owner and operator of a UHF television broadcast station in Milwaukee from the time of construction in 1953 until February 27, 1955. Poller claimed CBS, in violation of the antitrust laws, had conspired with others to acquire his station at a price below its actual value. He states the basis of his suit as being that the alleged conspirators frustrated the efforts of others to acquire his station, secretly obtained an option on a competing station, and then cancelled the affiliation agreement CBS had had with Midwest. As a result of what he calls "this three-pronged maneuver," Poller says the conspirators purchased his equipment from him at a price far less than its real value, although he admits the purchase was "on plaintiff's entreaty."

More specifically, the facts are these: Under a construction permit granted February 4, 1953, Midwest Broadcasting Company began the construction of a UHF television broadcast station in Milwaukee, where there was already a VHF station affiliated with NBC. On August 21, 1953, as its station neared completion, Midwest made an affiliation agreement with CBS, subject to the latter's unilateral right to cancel at any time on six months' notice.[1] A short time later Bartell Broadcasters began [fol. 292] operating another UHF station—WOKY—in Milwaukee. The Bartell station was neither as elaborate nor as successful as Midwest's.

In January, 1954, Midwest was informed by a broker that, if and when the Federal Communications Commission adopted a multiple ownership rule which would permit George B. Storer to add a UHF station to the others owned by him, Storer would pay $2,000,000 for Midwest's station. About that time the latter began adding substantial improvements to its facilities.

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[1] Poller "continuously" pleaded with CBS to eliminate the provision for cancellation on six months' notice, but CBS refused. Poller said he used the CBS insignia "with trepidation," because of the tenuous nature of the network affiliation.

CBS says it had faith in UHF, although general opinion in the industry was that it could not successfully compete with VHF. It therefore determined, later in 1954, to acquire a UHF station in Milwaukee, if and when the Commission should adopt the "5 and 2" rule,[1] which would permit it to do so. CBS had learned of Poller's efforts to sell the Midwest station for approximately $2,000,000 —a price it considered to be substantially more than the property was worth, and "completely out of line." Because of this, CBS chose not "to enter into any kind of trading" with Poller, but decided to attempt to acquire the other UHF station in Milwaukee. To that end, it employed one Thad Holt, an independent consultant, to obtain from Bartell an assignable option to purchase station WOKY. On July 29, 1954, Holt obtained such an option in his own name, without disclosing the identity of his principal. The option price was $335,000, which Holt said was arrived at by adding $50,000 to Bartell's investment. This option, which endured until October 1, 1954, was extended to February 1, 1955. On September 17, 1954, the Commission adopted the 5 and 2 rule, effective October 22. On October 25, 1954, Holt assigned the option to CBS, which immediately exercised it.

Meantime, on October 21, CBS notified Midwest that its affiliation agreement would be cancelled as of April 22, [fol. 293] 1955. The day after the notice of cancellation was given, Poller flew to New York and pleaded with officials of CBS to reconsider the termination of his company's affiliation, stating he had gone to great expense for a new studio and equipment, far more elaborate than that he would have required for a station which did not have a CBS affiliation. He stated he intended to continue television broadcasting in Milwaukee but that he would not require for that purpose the expensive equipment he had contracted to purchase.

It was suggested that CBS might protect Midwest against the loss Poller feared by purchasing the physical equipment for which it had contracted and by taking over

[1] An amendment to the multiple ownership rule permitting one person to own five VHF and two UHF television stations.

its studio lease. CBS agreed. It took over the studio and equipment, transferred to Midwest the equipment it had bought from Bartell, and paid Midwest the sum of $500,000. Midwest acknowledged that CBS had assumed liability for the work in progress and had paid it in full for the sums it had spent. Midwest also agreed to operate its station with the equipment formerly owned by Bartell, but failed to do so.

On February 17, 1955, CBS began operating its UHF station in Milwaukee, having paid Midwest $1,000 a day for advancing the cancellation date from April 22, 1955; but on March 21, 1959, the station was closed because its operation was marginal or unprofitable.[3] Midwest ceased broadcasting February 27, 1955, and in December, 1955, its corporate existence was terminated and all its assets were transferred to Lou Poller, who had been its president and sole stockholder.

In September, 1956, Poller filed this suit in the United States District Court against Columbia Broadcasting Sys- [fol. 294] tem, CBS-TV, an unincorporated division of CBS, J. L. Van Volkenburg and H. K. Akerburg, respectively president and vice president of CBS-TV, Bartell Broadcasters, and Thad Holt. As we have said, he charged them with conspiring to acquire the Midwest station in violation of the antitrust laws and at a price below its actual value, and charged CBS with monopolization and an attempt to monopolize.

Poller prayed for damages which he computed as follows: he sold the Midwest property, which he says was worth $2,000,000, to CBS for $500,000 and the transfer of the Bartell equipment, which he says was worth no more than $50,000; therefore he claimed damages of $1,450,000, trebled in accordance with the statute.

After extensive filings of interrogatories, depositions and affidavits, the District Court on June 9, 1959, entered an order granting the defendants' motion for summary judg-

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[3] When CBS acquired its Milwaukee station, there were two VHF stations in that market and a third went on the air thereafter. The result was that CBS was operating the only UHF station in the nation which was in competition with three VHF stations in the same market.

ment and dismissing the complaint as to CBS, Van Volkenburg and Akerburg. The opinion of the District Court is reported at 174 F. Supp. 802 (1959). Poller appeals.

The first question is—assuming without deciding that Midwest received less than the fair value of its station—whether Midwest was forced to sell by anything CBS did. Poller admits that the large value he placed on the Midwest station—greatly in excess of its cost—depended upon a CBS affiliation not subject to cancellation on six months' notice. Midwest did not have such an affiliation, and from the beginning CBS had refused to grant it. Poller realized from the outset the shakiness of his position and used the CBS insignia "with trepidation." His sale to CBS was not sought by the latter. On the contrary, CBS bought Poller's equipment only at his importunity and to save him from the loss he thought he was about to suffer because he had improvidently contracted for construction of elaborate facilities which he would need only if he had the firm affiliation CBS had consistently refused to give him.

[fol. 295] We are of the opinion that Poller's entreaty to CBS to buy his equipment was brought about by his own act of investing too heavily in the UHF equipment without having a firm network affiliation. Certainly he sought the sale and entered into it voluntarily.

If it be assumed, however, that Poller was forced to sacrifice his station by the acts of the alleged conspirators, other questions remain. Was there a conspiracy? If so, did the acts of the conspirators restrain trade or commerce in the television industry?

We turn to a consideration of the first of these questions: Did CBS and the individual appellees enter into a conspiracy in restraint of trade or commerce among the several States? The purpose of Section 1 is to prohibit joint action of two or more persons in combining their economic power and restricting competition. Poller's charge that CBS conspired with one of its unincorporated divisions and two of its employees is obviously unsound. It is in reality a charge that CBS conspired with itself.

As the Fifth Circuit said in *Nelson Radio & Supply Co. v. Motorola*:[4]

> " . . . It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation. . . . [A] corporation and its subsidiaries can be guilty of a conspiracy in restraint of trade but that involves separate corporate entities. . . . "

We conclude that CBS, its unincorporated division, and its employees were incapable of conspiring to restrain trade or commerce. The question becomes, then, whether CBS conspired with Bartell Broadcasters or Thad Holt [fol. 296] to accomplish that purpose. Bartell and Holt are not now parties: the complaint was dismissed by the court as to the former upon its suggestion of improper venue, and the latter was never served with process.

The record shows Bartell gave an option to Holt without knowing he was acting for CBS, and did nothing more than sell its station as it was required to do by the option. Holt knew nothing of Poller or his station, and merely acted as agent for CBS in obtaining the Bartell option. In short, the record shows Bartell and Holt did not enter into a concerted scheme with CBS, but that the latter alone conceived and consummated the plan of acquiring the UHF station in Milwaukee which had been competing with Midwest.

Even if it be thought that Bartell and Holt combined with CBS to accomplish a common purpose, it does not seem to us that the purpose was to restrain trade or commerce. Poller complains that CBS cancelled Midwest's affiliation. It had the contractual right to do that. He complains that CBS chose to buy the Bartell station instead of his own. Certainly CBS did not act illegally in making that choice; it was under no sort of obligation to buy the Midwest station.

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[4] 200 F. (2d) 911, 914 (1952), *cert. denied* 345 U.S. 925 (1953).

Then, when CBS saved him from the loss he might have suffered had he been left with the expensive facilities he had bought to meet a network affiliation he did not have, Poller complains he was forced by CBS to make a sacrificial sale. But his real complaint is that CBS would not eliminate the six months' cancellation clause from his affiliation agreement. He had never been led to believe this would be done; on the contrary, CBS had consistently refused to do it. Nevertheless, despite his "trepidation," Poller recklessly proceeded to incur large liability for expanded facilities he knew he would not need without the affiliation which had been continuously denied him.

It was said in *United States* v. *Colgate & Co.*, 250 U. S. 300, 307 (1919):

> [fol. 297] "... In the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. ..."

The Supreme Court has not departed from this rule, which has since been applied to broadcasting networks. In *Federal Broadcasting System* v. *American Broadcasting Co.*, 167 F. (2d) 349, 351, *cert. denied* 335 U. S. 821 (1948), the Second Circuit said:

> "... The principal ground urged in support of the charge of a boycott as a basis for the temporary injunction is that by concerted action the American and Mutual networks have cancelled their existing arrangements with the plaintiff. However, each did this pursuant to the terms of its agreement, and it is clear that if these defendants really acted individually and not jointly they were within their rights. A network is not a common carrier and each therefore had the right in the absence of concerted action to make such contracts for the distribution of its programs as it chose. ..."

We conclude from the foregoing that the acts done by CBS and its co-defendants did not restrain trade or commerce. Hence, any injury to Poller's business and property caused by those acts was not the result of a violation of Section 1 of the Sherman Act.

The next question is whether CBS monopolized any part of the trade or commerce among the several States.[5]

[fol. 298] As we have seen, CBS cancelled its affiliation with Midwest, bought the Bartell UHF station, later traded the Bartell equipment for that of Midwest, and also paid a large cash consideration, and then attempted to operate a UHF station in Milwaukee but failed and closed the station. These acts do not manifest an attempt to monopolize any part of the trade or commerce in the television industry. There was no attempt to monopolize UHF in Milwaukee, for Poller expressly said he would continue to operate there with the less elaborate Bartell equipment which would be sufficient for operation without a CBS affiliation. He accepted the Bartell equipment for that purpose. The failure of UHF in Milwaukee seems to have been due to the superiority of the VHF competition.

Poller argues that each of the three national television networks—American Broadcasting Company, CBS and National Broadcasting Company—has a "vertical" monopoly, despite the fact they are fiercely competitive.[6]

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[5] It has already been shown that CBS did not combine or conspire with any person or persons to do the acts which are the basis of Poller's complaint. Hence it did not "combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States." So, the question is limited, as stated in the text above, to the question whether CBS itself monopolized any part of the trade or commerce among the several States, or attempted to do so.

[6] This notion is thus expressed in Poller's brief:

> "It is a vital fact that because of physical limitations a particular station can broadcast only one program at a time, and because programs can only be received on a particular set one at a time there is an automatic exclusion by each program of all others at that time.
>
> "Accordingly, the broadcast of a network program results in a vertical monopolization of every station throughout the country which receives and transmits that program at the

[fol. 299] The appellant says that, because a particular station can broadcast only one program at a time and only one program at a time can be heard on a receiving set, the broadcast of a network program results in vertical monopolization of every television station in the nation which receives and transmits it. This is the result of physical laws, and cannot be said to be monopolization by CBS or either of the other two networks.

Appellant goes on to argue that "In the great majority of markets where there are more than two stations each network requires that the station which takes its programs must become in effect its exclusive station"; that "The network does even more; it ties the stations to affiliation agreements which give the network exclusive control, yet keeps them dangling by the provision under which it can at will terminate the franchise upon which their financial fate depends."

---

time it is broadcast. The case is no different than it would be if because of physical law three concerns doing the same thing could reach into only one of three separate areas of space. In a sense, they would be competing with each other. But it is equally true that each of them would have an exclusive monopoly in the *entire* area that it could *possibly* embrace. It is no less a monopolization by any one merely because there is another outside area unapproachable by it, in which others likewise hold exclusive sway.

• • • • • • •

"In the great majority of markets where there are more than two stations each network requires that the station which takes its programs must become in effect its exclusive station. Thus, by the coercive power of its programming the network has accumulated what it calls a chain of affiliated stations. These affiliates are no part of the network's investment of money or management. Others have made the investment; others have the burden of management; others run the risk of loss. But by virtue of the network having the program to sell, it requires by contract that these stations become in effect its subsidiaries. Thus, by an ironic perversion of the circumstances, the supplier dominates the customer. The network does even more; it ties the stations to affiliation agreements which give the network exclusive control, yet keeps them dangling by the provision under which it can at will terminate the franchise upon which their financial fate depends."

Poller asserts that the power of CBS to own and operate television stations is "a potent monopolistic weapon." He characterizes it as an "element in the chain of monopoly practice." This power, he says, is "a po- [fol. 300] tential threat against every station in the country." He expresses the belief "that, notwithstanding commission sanction,[1] the ownership of stations by networks effects such a concentration of control in the television industry as is violative of the antitrust laws."

Whether appellant's assertions are valid is not before us. Nor are we called on to review the 5-2 regulation. Rather, the question is whether, by the exercise of the right to acquire the Bartell station and the Poller equipment, CBS monopolized or attempted to monopolize interstate trade or commerce in the television industry; and, if so, whether Poller is thereby injured in his business or property. We perceive no monopoly or attempt to monopolize but, instead, an unsuccessful attempt to compete with other Milwaukee stations. For, after the Bartell acquisition, CBS had competition in Milwaukee from both VHF and UHF stations, and after acquiring Poller's equipment its station continued to have VHF competition to which it finally yielded. Of course, the competitive situation among the networks continued as before.

Assuming, however, (without deciding) that by either acquisition CBS was monopolizing or attempting to monopolize, we are of the opinion, for reasons stated elsewhere in this opinion, that Poller was not thereby injured [fol. 301] in his business or property. Such injury as he may have sustained, we repeat, was caused by his improvi-

[1] The Commission sanction to which Poller refers is the 5-2 regulation of the Federal Communications Commission permitting one concern to own as many as, but not more than, five VHF and two UHF stations. The Commission has thereby held in effect that a network's ownership of that small number of stations is not against the public interest. As monopolization or an attempt to monopolize any part of trade or commerce among the several States is contrary to the public interest, the effect of the expert Commission's regulation is that such limited multiple ownership of facilities in the field it regulates does not violate Section 2 of the Sherman Act. Much weight should be given, we think, to the Commission's holding.

dence in contracting for elaborate equipment to meet the requirements of a firm affiliation he knew he did not have.

Such is the monopolization with which CBS is charged. The essence of it is that the network keeps the stations "dangling" because of the provision it can cancel the franchise at will. That is to say, CBS is charged with monopolizing or attempting to monopolize some part of trade or commerce in the television industry because it kept Midwest "dangling" by retaining the right to terminate its affiliation on six months' notice. The retention of the right to cancel was lawful, and Midwest agreed to it.

All affiliation agreements between networks and stations are for fixed and limited terms, just as are station licenses granted by the Federal Communications Commission, but Poller does not claim this produced monopoly, even though the network is under no obligation to renew. It is the right of cancellation retained by CBS which he says kept his station "dangling." Although he was unhappy about it, Poller knowingly accepted affiliation subject to cancellation on six months' notice, as he could do no better. We see no reason for him to complain that the option to cancel was exercised.

Whether or not *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 100 U.S. App. D.C. 161, 243 F. (2d) 418 (1957), is dispositive here, as the District Court held, that case is certainly relevant and indicative of the applicable doctrine. Several dealers in Baltimore had one-year contracts with Packard to sell its cars in that area. One of them informed Packard he would not continue as dealer unless he were granted an exclusive agency. Packard agreed, and refused to renew the franchises of the other dealers. One of them sued Packard for triple damages, alleging the transaction constituted a conspiracy in restraint of trade in violation of the Sherman Act. We [fol. 302] held there was no contract or conspiracy to restrain trade within the meaning of the Sherman Act.

We have noted appellant's argument that the national networks have coercive and restrictive practices which extend the monopoly he asserts they have. These prac-

tices are: (1) the "must buy" policy which requires advertisers to buy time on a designated group of stations; (2) the "option time" practice under which affiliates contract to accept and broadcast all network programs offered to them during designated hours of the broadcast day.

We need express no opinion regarding these practices because it does not appear that either played any part in causing the injury to the business and property of Poller, of which he complains.

In sum, we hold the record shows there was no illegal conspiracy to restrain trade or commerce among the several States, that no restraint of such trade or commerce appears, and that no monopoly or attempt at monopoly was shown.

Affirmed.

WASHINGTON, *Circuit Judge, dissenting*: Poller's suit charges a conspiracy in restraint of trade in violation of Section 1 of the Sherman Act and a monopoly, attempted monopoly, or conspiracy to monopolize trade in violation of Section 2 of that Act. The District Court, without deciding whether the Sherman Act had been violated, gave summary judgment against Poller on the ground that his admitted injuries were *damnum absque injuria*, since CBS had a contractual right to cancel Poller's affiliation agreement and a legal right to choose to buy a rival station and to give that station (i.e., itself) the CBS affiliation. The majority of this court would affirm on the [fol. 303] ground, as I understand it, that there was as a matter of law, on the record here, neither a conspiracy in restraint of trade nor a monopoly or attempted monopoly.

I disagree. In my view, Poller raises genuine issues of material fact as to whether there was a conspiracy against him in restraint of trade and a monopoly. The charges he makes may, of course, appear ultimately to be without foundation in fact. But I think he is entitled to an opportunity to attempt to establish his charges before a jury, and that it was error to give summary judgment against him. Where the propriety of a summary judgment is involved, we are required, of course, to look

at the case in the light most favorable to the plaintiff. *Calloway* v. *Hamilton National Bank*, 90 U.S.App.D.C. 228, 195 F.2d 556 (1952).

1. Poller's allegation of conspiracy does not relate to the Columbia Broadcasting System (CBS) alone. It includes an unincorporated wholly-owned subsidiary, CBS-TV, two officers of CBS-TV, and other persons. It is clear that corporate officers can be members of a conspiracy with their corporation. The Supreme Court has so held. *Schine Theatres* v. *United States*, 334 U.S. 110, 116 (1948); *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 227 (1947). The same cases establish that a corporation may violate the Sherman Act by conspiring with its wholly-owned subsidiaries. See also *United States* v. *Radio Corporation of America*, 358 U.S. 334 (1959); *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U.S. 211 (1951). In my view, CBS could conspire with CBS-TV, a wholly-owned, but not incorporated, "division"—as separate and distinct an organization as a wholly-owned subsidiary. Since there were other alleged co-conspirators, it is unnecessary, however, to rely on that ground. The outside persons, included as conspirators in plaintiff's charges, are not ruled out as possible conspirators merely because they are not presently defendants in this suit. A plaintiff is not required to sue and obtain judgment [fol. 304] against every conspirator at his peril. Nor do I think that it is clear here, as do the majority, that these others were not conspirators. Whether or not they were is in issue, and the issue can only be resolved by proof.

2. In general, of course, a corporation may, without legal liability, deal with persons of its choice and exercise the rights given it by its contracts. But clearly one of the qualifications to the free exercise of these rights is that they may not be used in a way which amounts to a conspiracy to restrain or to monopolize trade among the states. *See United States* v. *Parke, Davis & Co.*, 362 U. S. 29, 36-47 (1960).

Packard Motor Car Co. v. *Webster Motor Car Co.*, 100 U.S.App.D.C. 161, 243 F.2d 418, cert. denied, 355 U.S. 822 (1957), is not dispositive here. Upon loss of its franchise

to sell Packard automobiles, the retail dealer involved could use its properties in a variety of ways, including the sale of other automobiles in competition with the Packard automobile. But a TV station operator can make only one use of his property, and, as will appear, without a network affiliation the property cannot be as profitably used, and the business may fail in consequence. Thus, the economic impact of CBS' action in cancelling Poller's network affiliation and buying the competing UHF station was highly damaging in a competitive sense. Furthermore, the Packard Company did not itself invade the retail market. Here CBS, primarily a wholesaler of programs, has entered the retail field.[1]

[fol. 305] 3. The essence of a violation of Section 1 of the Sherman Act is an unreasonable injury to, or restraint on, competition in a particular market in interstate commerce. Involved in this case are competitive interactions in three primary markets. First, there is the market in which television stations are bought and sold by station operators and entrepreneurs. Second, there is the local television broadcasting market in which viewers in particular areas accept or reject programs offered over local broadcasting stations. Although station profits do not come directly from payments by viewers, it can be fairly said that individual station operators compete for audiences which they are in effect able to sell to national and local advertisers. Third, there is competition among program producers for national advertisers. While local station owners may on occasion independently produce programs which merit the attention of advertisers seeking nationwide audiences, it is generally true that the three great television networks are the only competitors for advertisers seeking national program audiences. Poller says—and it seems reasonably clear on this record—that television

[1] For similar reasons, the other "refusal to deal" cases are equally inapplicable here. See, *e.g.*, United States v. Colgate & Co., 250 U.S. 300 (1919); Schwing Motor Co. v. Hudson Sales Corp., 138 F.Supp. 899 (D. Md.), *aff'd*, 239 F. 2d 176 (4th Cir. 1956), cert. denied, 355 U.S. 823 (1957). *Colgate* was of course severely limited in the Parke, Davis & Co. case, *supra*, if not sent "to its demise." See Mr. Justice Harlan dissenting, 362 U.S. at 49.

stations in Milwaukee, especially UHF stations, cannot operate profitably without a network affiliation.

Through its operating division, CBS-TV, CBS is a primary producer of nationally broadcast television programs. While CBS owns several transmitting stations, CBS programs are generally presented to the viewing public over independently owned stations from which CBS obtains the right to use choice air time by means of affiliation agreements. At one time CBS-TV used the facilities of Poller's UHF station in Milwaukee under a network affiliation agreement. The present dispute arises because CBS-TV obtained an option to purchase the only competing UHF station in Milwaukee when it knew Poller's station was for sale, exercised its contract right to cancel Poller's network affiliation and then purchased Poller's equipment by giving him cash plus the poorer equipment [fol. 306] of the Bartell station on which the option had been obtained. At the end CBS-TV had eliminated both Poller and Bartell from UHF telecasting in Milwaukee and it remained as the only telecaster in that field.[2] Competition in the entire market, comprising both UHF and VHF, was reduced.

The allegation that this was accomplished through a conspiracy has been denied and the question is in issue, subject to proof. It is further claimed by Poller that CBS was the only network willing to give relatively equal consideration to affiliation with UHF or VHF stations; that as a result, CBS had great effect on the entry or continued existence of UHF stations in the various local broadcast markets; and that by waiting for Poller and Bartell to develop the UHF market in Milwaukee and then using its economic and contractual power to establish itself in Milwaukee in their stead, CBS must have seriously discouraged new UHF operations elsewhere, for few entrepreneurs would be willing to pioneer a new field only to have the fruits of success taken from them by a net-

[2] Whether or not CBS desired that result is a question of fact to be determined at a trial. In a case like the present, however, specific intent to restrain trade or monopolize may be unnecessary. See United States v. Griffith, 334 U.S. 100, 105 (1948).

work, without compensation. It is also claimed that the actions of CBS caused Poller's franchise to be reduced in value and his equipment to become useless and unmarketable elsewhere, and that CBS paid an unreasonably low price for his equipment.

In my view, the purchase and operation of the Bartell station as the exclusive CBS outlet in Milwaukee was an illegal restraint on competition if it forced Poller to go out of business under circumstances which discouraged or actually precluded the entry of new UHF stations into the Milwaukee TV market and other TV markets, thereby seriously retarding the development of the entire [fol. 307] television industry.[3] Likewise, I think that the elimination of Poller in the way claimed could be deemed to be an elimination of competition by unfair means, an abuse which the antitrust laws were intended to preclude. *National Biscuit Co.* v. *Federal Trade Commission*, 299 Fed. 733, 738 (2d Cir. 1924); *United States* v. *Klearflax Linen Looms, Inc.*, 63 F.Supp. 32 (D. Minn. 1945). If Poller can prove these things to the satisfaction of a jury, I think he would be entitled to a verdict. He should be given that chance. On a motion for summary judgment the courts should be reluctant to deny the plaintiff his day in court when he alleges that he was forced out of business as a result of a conspiracy to eliminate him as a competitor. See *Slick Airways, Inc.* v. *American Airlines, Inc.*, 107 F.Supp. 199, 214 (D. N.J. 1951), app. dismissed, 204 F.2d 230 (3d Cir. 1953), cert. denied, 346 U.S. 806 (1953). And this would seem particularly true where (as here) it is charged that the public has been deprived of maximum television service by a reduction of competition. See *Packaged Programs, Inc.* v. *Westinghouse Broadcasting Co.*, 255 F.2d 708 (3d Cir. 1958).

My view is based in part upon *United States* v. *Radio Corporation of America*, 358 U.S. 334 (1959). There the United States asserted that RCA and its wholly-owned subsidiary NBC had threatened to cancel the NBC pro-

[3] Had CBS merely cancelled Poller's affiliation and given an affiliation contract to another independent Milwaukee station, it may be that no competitive evils would have resulted.

gram affiliations of certain Westinghouse-owned stations, unless Westinghouse agreed to exchange its Philadelphia TV station for one owned by NBC in Cleveland, plus cash. The exchange was made and NBC was enabled to enter a new market area. The District Court granted summary judgment for RCA on the theory that the United States was precluded from bringing an antitrust action because the Federal Communications Commission had ap- [fol. 308] proved the challenged transaction. 158 F.Supp. 333 (E.D. Pa. 1958). The Supreme Court repudiated this theory, and reinstated the complaint. Although the Supreme Court did not expressly characterize as illegal the actions of RCA, its reversal of the District Court would appear to mean that the complaint adequately stated a cause of action. If the plaintiff's allegations are proved, the present case differs only in that CBS did not openly threaten Poller. If the actions of CBS in fact had an irresistibly coercive effect on Poller, the absence of an overt threat would not be significant, and Poller's claim seems to be even stronger than that of Westinghouse, since here, unlike its case, the result of the CBS transaction was to reduce TV competition in the particular market area involved.

4. Similarly, Poller would be entitled to recover under Section 2 of the Sherman Act if he can prove, as he claims, that CBS had power to exclude him and other competitors in Milwaukee, and intended to use that power. See *United States* v. *Griffith*, 334 U.S. 100 at 107 (1948). "It is the exclusion of others from the opportunity of doing business that is regarded as monopolizing." *National Biscuit Co.* v. *Federal Trade Commission, supra* at 738.

The present record suggests that it may appear, if proof were offered, that once CBS had purchased Bartell's station, it had absolute power to exclude other independent UHF operators from Milwaukee so long as the other networks did not alter their attitudes toward UHF. Certainly, there are substantial indications that CBS had monopoly power over UHF in Milwaukee at

the time it cancelled Poller's affiliation. Although CBS' station was in competition with Milwaukee VHF stations for viewers and thus not a monopolist in the viewer market, it may well be that CBS' economic strength gave it virtual monopoly power over the entry of new stations into Milwaukee. The possibility of new VHF entrants [fol. 309] into Milwaukee may have been closed for practical purposes (apparently the third and last VHF channel in Milwaukee went into operation shortly after CBS entered Milwaukee). And by lowering local advertising rates or being able to do so, CBS may have been able effectively to preclude the entry into Milwaukee of new UHF independents who were simultaneously faced with the reluctance of other networks to affiliate with them. Proof of such facts would, I think, support a verdict in Poller's favor.

In reaching my conclusions as to both Sections 1 and 2, I have not failed to note that with respect to each of the claimed violations CBS made factual allegations which if proved might warrant a judgment in its favor, and that proof of Poller's claims will not be easy. But I think that he is entitled to go to trial.

[fol. 310] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Civil 3761-56

No. 15,379

LOU POLLER, Appellant,

v.

COLUMBIA BROADCASTING SYSTEM, INC., et al., Appellees.

Appeal From the United States District Court
for the District of Columbia

Before: Wilbur K. Miller, Chief Judge, and Prettyman and Washington, Circuit Judges.

JUDGMENT—November 10, 1960

This Cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On Consideration Whereof It is ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby, affirmed.

It is further Ordered by the Court that appellees herein recover from appellant their taxable costs on this appeal, and have execution therefor.

Per Chief Judge Wilbur K. Miller

Dated: November 10, 1960

Separate dissenting opinion by Circuit Judge Washington.

[fol. 313] Clerk's Certificate to Foregoing Transcript (omitted in printing).

[fol. 314]

SUPREME COURT OF THE UNITED STATES

No. 690, October Term, 1960

LOU POLLER, Petitioner,

vs.

COLUMBIA BROADCASTING SYSTEM, INC., et al.

ORDER ALLOWING CERTIORARI—March 20, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILED
FEB 1 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, [redacted] 1961

No. ~~800~~ 45

LOU POLLER,

Petitioner

v.

COLUMBIA BROADCASTING SYSTEM, INC., CBS TELEVISION, J. L. VAN VOLKENBURG, and H. K. AKERBERG,

Respondents

PETITION OF LOU POLLER FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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IN THE

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COLUMBIA BROADCASTING SYSTEM, INC., CBS TELEVISION, J. L. VAN VOLKENBURG, AND H. K. AKERBERG,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Lou Poller, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on November 10, 1960.

OPINIONS BELOW.

The opinion of the District Court is reported in 174 F. Supp. 802. It is also printed in the "Joint Appendix"[1] at pages 282-6.

The opinion of the Court of Appeals has not yet been reported. A copy is appended to this petition, as Appendix A (*Infra*, p. 15).

JURISDICTION.

The judgment of the Court of Appeals was entered on November 10, 1960. The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646(1), 62 Stat. 928(1), 28 U. S. C. § 1254(1).

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1. A Joint Appendix was filed in the court below. A certified copy of this appendix and 9 additional copies thereof, have been filed with this petition in accordance with Rule 21 of this Court. All references to the Joint Appendix are designated "JA".

QUESTIONS PRESENTED.

1. Where a national TV network purchased the UHF station of its affiliate's competitor and then cancelled the affiliation and bought the affiliate's equipment, so that the network became the sole owner and operator of UHF in the area and excluded all other entrants into UHF in the area, is it proper to ignore all the evidence of its monopoly, attempted monopolization and conspiracy, on the ground that the network had the contractual "right" to cancel the affiliation and the inherent "right" to purchase a station and therefore the admitted injury to petitioner was *damnum absque injuria*?

2. Is contributory negligence a defense to the Sherman Act; i.e., should the victim be denied redress because he had prospered and expanded his station with knowledge that the monopolist exercising its contract "right" might cancel the affiliation and eliminate him?

3. Is a network's vertical integration by entry into the station operation business equivalent to the benign selection by a trader of the customer with whom he will deal?

4. Can an unincorporated subsidiary be a party to a conspiracy in restraint of trade, where it operates precisely like an incorporated subsidiary?

5. May summary judgment be granted against a plaintiff despite genuine issues of fact, because the court chooses to accept the evidence of the defendant and ignore the testimony in contradiction of it?

STATUTES INVOLVED.

The statutory provisions involved are Sections 1, 2 and 7 of the Sherman Act, Act of July 2, 1890, c. 647, §§ 1, 2 and 7, 26 Stat. 209, 15 U. S. C. §§ 1, 2 and 7; and Section 4 of the Clayton Act, Act of October 15, 1914, c. 323, § 4, 38 Stat. 731, 15 U. S. C. § 15. They are printed in Appendix B (*Infra*, p. 35).

STATEMENT OF THE CASE.

This is a treble damage suit charging violations of Sections 1 and 2 of the Sherman Act.

Petitioner is the assignee of Midwest Broadcasting Company ("Midwest"), a corporation which owned and until February 27, 1955 operated a UHF (ultra high frequency) television broadcasting station (WCAN-TV) in Milwaukee, Wisconsin (JA 6, 235).

After a long freeze on the issuance of licenses for new stations, the Federal Communications Commission (FCC) in June 1952 made additional channels in the UHF band available for television. Midwest then obtained a permit for a UHF station in Milwaukee and on August 12, 1953 signed an affiliation agreement with CBS-TV for two years. CBS-TV reserved the unilateral right to terminate the affiliation at any time on six months' notice (JA 15, 235-9).

In December 1953 the FCC gave notice of a proposed rule that would permit the ownership by a single licensee of 7 television stations of which not more than 5 could be VHF (very high frequency) stations.

At this time there were, in addition to petitioner's station, two other television stations in the Milwaukee market. One was a VHF station, affiliated with NBC and ABC. The other, WOKY-TV, owned by Bartell Broadcasters, Inc., was a UHF station with no primary affiliation (JA 16, 235).

By this time petitioner's station, WCAN-TV, was operating profitably, and was praised by CBS-TV as an outstanding example in the country of a successful UHF operation (JA 15, 241).

As a result of his success petitioner had embarked on a considerable expansion program of which he kept CBS fully informed. He acquired new and improved equipment for his station and was building a new studio (JA 18, 242). Storer Broadcasting Co. had manifested an interest in acquiring

petitioner's station for $2,000,000 if the proposed FCC rule was adopted, and petitioner had indicated his willingness to sell (JA 17, 239).

In July 1954 the CBS respondents, in anticipation of the new FCC rule, determined to acquire for themselves an option to buy a UHF station in Milwaukee (JA 19, 32). They therefore engaged the services of defendant Thad Holt (JA 19, 50). On July 26, 1954 Holt met with CBS representatives in New York, and from there went directly to Milwaukee (JA 91). Three days later, without disclosing CBS' interest in the transaction, Holt secured from Bartell an option in his own name to purchase station WOKY-TV (JA 91). Neither Holt nor CBS ever approached petitioner regarding the purchase of his station, although CBS knew of petitioner's discussions with Storer and had tried to dampen Storer's interest in petitioner's station by refusing to give assurance that the CBS affiliation would be continued (JA 26, 163-5, 178-9).

On September 17, 1954, the FCC adopted its proposed rule, effective October 22, 1954. Late on October 21, 1954, a few hours before the rule become effective, CBS-TV telegraphed petitioner that his affiliation was cancelled (JA 20).

Petitioner immediately flew to New York and pleaded with the officials of CBS for an explanation and reconsideration of their cancellation of his affiliation (JA 50, 223-4). As a result of this meeting an agreement was entered into whereby CBS-TV acquired the physical assets of petitioner's station and an assignment of his studio leases and transmitter site, in exchange for $500,000 and the physical equipment CBS was acquiring from Bartell. The agreement contained a statement that petitioner would continue to operate a television station in Milwaukee (JA 51, 61). This was made a condition of the deal by CBS although both parties realized Poller could not continue operations and the statement was nothing more than "window dressing" (JA 105-6).

On October 25, 1954 Holt assigned his option to CBS and CBS immediately exercised it (JA 20, 92).[2]

On February 17, 1955 CBS-TV commenced operation in Milwaukee under the call letters WXIX-TV; and on February 27, plaintiff ceased broadcasting. CBS-TV, the producer of national TV programs, thereupon became the sole UHF station owner and operator in the Milwaukee area (JA 21-2).

In September, 1956, petitioner brought the present action on the ground that the events in Milwaukee constituted a conspiracy to eliminate the only two UHF stations in Milwaukee, petitioner's and Bartell's, and at the same time to coerce petitioner to sell to CBS-TV at a distress price through cancellation of the CBS affiliation, with the result that CBS would become the sole UHF telecaster in the Milwaukee market. Petitioner further claimed that respondents' conduct constituted monopolization and an attempt to monopolize. Petitioner claimed damages for the loss of his station.[3]

The District Court, Holtzoff, J., granted summary judgment against petitioner on the ground that assuming that the Sherman Act had been violated and a conspiracy had been shown, nevertheless, petitioner's admitted injuries were *damnum absque injuria* because CBS had simply exercised a contractual right to cancel petitioner's affiliation and a legal right to choose to buy a station, albeit a rival station which CBS-TV now would operate as a self-affiliate (JA 282).

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2. The FCC approved the acquisition of station WOKY-TV by CBS by the narrow division of three to two, with a strong dissent by Commissioners Hennock and Bartley that this transfer would not serve the "public interest, convenience and necessity." 11 *Pike and Fischer, Radio Regulation* 913. One of the affirming Commissioners was Lee to whom Dr. Stanton had previously spoken, *ex parte*, concerning CBS' acquisition of a UHF station in Milwaukee (JA 173-6).

3. Damages are claimed in the amount of $1,450,000 and the trebled amount of $4,350,000. This represents the difference between the actual value of petitioner's equipment and facilities (at least $2,000,000) and the amount at which CBS-TV acquired it ($500,000 in cash and used equipment of WOKY-TV worth no more than $50,000).

The Court of Appeals (Judges Prettyman and Washington) heard argument on February 5, 1960, and on its own motion, reargument on May 23, 1960 before Wilbur K. Miller, C. J., Prettyman and Washington, JJ. On November 10, 1960, the Court of Appeals affirmed the judgment of the District Court in an opinion by Chief Judge Miller. A vigorous dissent was filed by Judge Washington.

REASONS FOR GRANTING THE WRIT.

1. The Court below has created new law which would make profound changes in the antitrust laws.

(a) It has made contributory negligence a defense. The majority opinion declares that assuming a conspiracy and a restraint of trade, no cause of action exists because Poller "recklessly proceeded" to expand his successful station and hence the admitted injury to him was not the result of a violation of Section 1 (*Infra*, p. 22).

The same theory is used for holding that there was no violation of Section 2. The majority opinion states that assuming CBS became a monopolist in Milwaukee by acquiring Poller's and Bartell's stations, nevertheless, Poller was not thereby injured in his business or property because such injury "was caused by his improvidence" in expanding his station (*Infra*, p. 25).

Whether Poller expanded less or more, is a matter of damages which cannot affect the question of causation, i.e., whether he was injured by the violation of the Sherman Act.

(b) The court below also created a doctrine of estoppel by contract as a defense under the Sherman Act. Any violation of Section 1 was held excused because Poller accepted CBS' affiliation contract with a six months' cancellation provision. The court below therefore treated all the injury that flowed from the cancellation as legally without remedy because it was authorized by a contract provision.

As to Section 2, the court applied the same principle. It added that CBS was also excused because Poller agreed, when he was forced to turn his equipment over to CBS-TV, that he would continue to operate. This provision in the contract was required by CBS (JA 159, 222). It served no purpose of Poller's, but he had no bargaining power with CBS and had to acquiesce. The provision obviously was inserted out of fear of the Sherman Act, for it had no relevance to the contract of purchase of equipment. The court below has now exalted this self-serving provision to a complete defense against the charge of monopolization.

Whatever the monopolist may coerce by way of agreement from its victim cannot constitute a defense when the monopolist is brought to account for the injury done.

2. The court below extended *United States v. Colgate & Co.*, 250 U. S. 300 (1919), in direct conflict with decisions of this Court. The court below held that what otherwise would have been a restraint of trade or monopolization was excused because CBS exercised its "rights". It held that CBS had the inherent "right" to buy Bartell's station instead of Poller's and had the contractual "right" to cancel Poller's affiliation. Ignoring the obvious effect of these acts *in combination*, it concluded that CBS did not restrain or monopolize trade because it merely exercised as to Bartell the long-recognized right of a manufacturer or trader to choose the customer with whom he will deal, and as to Poller exercised the "right" granted by its contract to terminate its affiliation (*Infra*, p. 21).

The limits of the ever-recurring argument that a manufacturer or trader has the right to select his customer (*United States v. Colgate, supra*), was recently reviewed in *United States v. Parke, Davis & Co.*, 362 U. S. 29 (1960). Whatever may be the fullest reaches of *Colgate* as explained in *Parke, Davis*, it does not even apply where a national network uses its leverage power as a network to enter into the business of operating a local TV station and thereby reduce

competition and create monopoly. *Eastman Kodak v. Southern Photo Materials Co.*, 273 U. S. 359 (1927); *United States v. Griffith*, 334 U. S. 100 (1948); *Schine Chain Theaters v. United States*, 334 U. S. 110 (1948); *United States v. Columbia Steel Co.*, 334 U. S. 495 (1948).[4] A situation closely parallel to that which confronted Poller was before this Court in *United States v. Radio Corporation of America*, 358 U. S. 334 (1959), where the complaint was predicated upon such coercive use of network power and this Court reversed a summary judgment dismissing the complaint and remanded the case for further proceedings.

By thus extending *Colgate*, the court below held that leverage power in one field used for monopoly in another field is a simple case of customer selection.

Here, unlike *Packard Motor Car Company v. Webster Motor Car Company*, 243 F. 2d 418 (D. C. Cir. 1957), on which the court below relied, a network invaded the retail field and made petitioner's property worthless to everyone but the network. There the termination of affiliation was held to be a simple exercise of a contract right only after a full examination of all the surrounding circumstances to ascertain the power position of the manufacturer and the economic effect of its action in the market. Here the court below exalted the contract right to a level that reduced the surrounding circumstances to immateriality. It has, therefore, further extended its already controversial holding in *Packard*.

The court below excluded as irrelevant the important economic facts which are the basic concern of the Sherman Act. The economic fact is that CBS eliminated Poller the moment it bought Bartell. By reaching into the "retail" field of local station broadcasting in Milwaukee, CBS removed all network affiliation possibilities for everyone in the Milwaukee area. For the realistic fact is that the removal of CBS affiliation was the same as the removal of all

4. Similarly, *United States v. General Motors*, 121 F. 2d 376 (C. A. 7, 1941).

affiliation possibilities, since the other two networks were already affiliated with preferred VHF stations. CBS itself monopolized UHF in Milwaukee and became the sole operator. Thus, where previously there had been two UHF stations, now there was but one. Where there had been two independently operated UHF stations, now there was none. No one else could come into Milwaukee with UHF. The field was now closed and CBS was in exclusive control.

All these significant facts of monopoly and restraint of trade, which appear in Judge Washington's dissent, are notably absent from the majority opinion. For on its view of the law, they were irrelevant.

3. The court below held that a wholly-owned unincorporated subsidiary of a giant corporation is incapable of being a party to a conspiracy under the Sherman Act. It held this even though the subsidiary, CBS-TV, was established to operate in a well-defined economic area and functions as a corporation.[5] The dissenting opinion by Judge Washington flatly opposes this view (*Infra*, p. 28).

This is a new question, never before specifically decided by this Court. It is of ever-growing significance in the administration of the antitrust laws. For it is obvious, as appears in the present case, that since the decision in

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5. The unincorporated subsidiaries are called "divisions". Each division has its own officers (JA 149, 192); the officers of both unincorporated "divisions" and incorporated "companies" are equally subject to the direction of the Board of Directors (JA 193); subsidiary corporations have been changed into divisions and *vice versa* (JA 193); each division maintains a separate bank account, a separate table of organization, and separate accounts for payroll and accounting purposes (JA 149, 195). CBS admitted that other than the difference in corporate form there are no differences between CBS divisions and subsidiary corporations (JA 195).

Indeed, the independence of CBS-TV has been recognized to the extent that CBS has permitted it to enter into contracts with corporate subsidiaries and others, and even with other unincorporated divisions in its own name and on its own behalf (JA 45, 149).

Obviously, if the unincorporated division can contract, it can agree, and if it can agree, it can conspire.

Timken Roller Bearing Co. v. United States, 341 U. S. 593 (1951), some corporations have sought to avoid liability for conspiracy by unincorporating their subsidiaries.[6]

4. The limits of summary judgment procedure have been so seriously ignored, that this Court in the exercise of its supervisory power should forbid such encroachments on the right of trial by jury. Repeatedly, the court below accepts CBS' explanations of the facts. A striking instance of this is the statement that CBS "chose" not to attempt to buy Poller's station because it considered the $2,000,000 price too high (*Infra*, p. 17). This went to the decisive question why CBS, knowing that Poller's station was for sale, did not approach him, but instead bought Bartell's station and then took over Poller's equipment, thereby in the combined acts eliminating both Poller and Bartell. To justify this CBS claimed that its policy was never to buy a station from an affiliate except at the price the affiliate first asked. CBS then explained this extraordinary policy on the ground that it feared that otherwise people would be "claiming that we were improperly using our affiliation to grind down an individual and an individual's price". It could grind down an individual's price, if it wanted to, according to its vice president, "by telling a guy that if he didn't come down in price we'd go across the street and take the affiliation away from him, go across the street and buy" (JA 200). Clearly, CBS' explanation is alone sufficient to submit to the jury the issue whether it did not buy or even negotiate for Poller's station because it wanted to go across the street and grind down his price by transferring its af-

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6. CBS' President, Dr. Stanton, fixed the date of the divisional set-up in June of 1951 (JA 144); its Vice President, Mr. Salant, also referred to establishment of the "divisional" concept "in 1951 or shortly thereafter" (JA 194). Memoranda implementing the procedure on appointment and authorization of division executives are dated August 8, 1951 (JA 230-4). *Timken* was handed down June 4, 1951.

filiation. The majority accepts CBS' explanation without even mentioning the evidence which destroys it.

Similarly, the majority opinion refers to Poller's statement that he would continue broadcasting in Milwaukee even after he had abandoned his expensive equipment to CBS-TV. It states this as a fact, without even referring to the contrary evidence, such as the inadequacy of the Bartell equipment, the reasons for the statement that he would continue in business, or the obvious fact that he could not survive without an affiliation, now in competition with CBS-TV as a local operator, instead of Bartell.

The majority opinion is completely silent on the function of a court in summary judgment cases. It is only in Judge Washington's dissenting opinion that some of the contrary facts are set out and recognition is given to the test which should apply in viewing the evidence on such a motion. And as Judge Washington said, the general rule "would seem particularly true where (as here) it is charged that the public has been deprived of maximum television service by a reduction of competition . . . ." (*Infra*, p. 32).

5. Television is the newest and probably the most important medium of mass communication. Its enormous public influence was emphasized in the recent Presidential election. It is an industry which admittedly is "bursting at the seams" because of the limited number of VHF channels (JA 204). The only means of expanding television channels is in the wider spectrum of UHF. UHF was the great hope for independent television broadcasting in the United States. Poller was admittedly in the forefront of the energetic young broadcasters who had hoped to make UHF successful (JA 204, 241). At the height of his success he was struck down by CBS, whose affiliate he was. In Milwaukee the UHF field was cleared of independents and preempted by CBS. As Judge Washington said in his dissenting opinion:

> "... by waiting for Poller and Bartell to develop the UHF market in Milwaukee and then using its economic and contractual power to establish itself in Milwaukee in their stead, CBS must have seriously discouraged new UHF operations elsewhere, for few entrepreneurs would be willing to pioneer a new field only to have the fruits of success taken from them by a network, without compensation." (*Infra*, p. 31)

All of this was made possible by the power CBS had acquired by practices in the television industry which until now have gone unchecked. Today the television industry is in a stage which closely resembles the motion picture industry before *United States v. Paramount*, 334 U. S. 131 (1948). Practices long since condemned in the motion picture industry, such as "block booking" and "clearances", are still prevalent in television in the form of "option time" and "must buy".[7] The three giant television networks which create programs and advertising have been permitted also to own and operate stations, something which this Court condemned in the *Paramount* case. The extreme concentration of control in the three networks with its opportunities for coercion should alone be enough to hold illegal under the Sherman Act their further expansion into the station operation business. The enunciation of such a

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7. Since this action was begun significant developments have occurred which would warrant a change to the past tense in the treatment of "must buy". On November 27, 1958, CBS announced to its affiliates that effective March 1, 1959, it would no longer pursue the "must buy" policy, but instead would require a "minimum buy" by which network advertisers would be obliged to contract for a minimum amount of dollars of advertising if they desired to have any network advertising at all (JA 245-246). On January 7, 1959, NBC also announced abandonment of its "must buy" policy effective March 15, 1959 and the institution of a "minimum buy" plan (JA 246). ABC has enforced a "minimum buy" for some time.

However, since the practice was still in effect as of the times pertinent to this case, the present tense has been retained.

principle is required by the circumstances of the present case. For it is by cancelling Poller's affiliation and buying Bartell's station and Poller's equipment that CBS was able to monopolize UHF in Milwaukee.

CONCLUSION.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ABRAHAM L. FREEDMAN,
Counsel for Petitioner.

Feb. ary 1, 1961.

APPENDIX A.

OPINION OF THE COURT.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 15,379

LOU POLLER, APPELLANT

v.

COLUMBIA BROADCASTING SYSTEM, INC., ET AL., APPELLEES

Appeal from the United States District Court for the District of Columbia

Decided November 10, 1960

Mr. Abraham L. Freedman, of the bar of the Supreme Court of Pennsylvania, *pro hac vice*, by special leave of court, with whom *Mr. George R. Benesman* was on the brief, for appellant. *Mr. Wm. Montgomery Smith* also entered an appearance for appellant.

Mr. Samuel I. Rosenman, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Mr. Leon R. Brooks* was on the brief, for appellees.

Before WILBUR K. MILLER, Chief Judge, and PRETTYMAN and WASHINGTON, Circuit Judges.

WILBUR K. MILLER, *Chief Judge:* This is a civil suit for threefold damages under Section 4 of the Clayton Act brought by appellant, Lou Poller, against the appellee, Columbia Broadcasting System, and others. He charged them with combining and conspiring to restrain trade and commerce in the television industry in violation of Section 1 of the Sherman Act, and with monopolizing and attempting to monopolize trade and commerce in that industry in violation of Section 2 of the Sherman Act, and alleged he had thereby been injured in his business and property.

Poller sued as assignee of Midwest Broadcasting Company, a dissolved corporation of which he had been president and in which he had been the dominant figure. Midwest had been the owner and operator of a UHF television broadcast station in Milwaukee from time of construction in 1953 until February 27, 1955. Poller claimed CBS, in violation of the antitrust laws, had conspired with others to acquire his station at a price below its actual value. He stated the basis of his suit as being that the alleged conspirators frustrated the efforts of others to acquire his station, secretly obtained an option on a competing station, and then cancelled the affiliation agreement CBS had had with Midwest. As a result of what he calls "this three-pronged manouver," Poller says the conspirators purchased his equipment from him at a price far less than its real value, although he admits the purchase was "on plaintiff's entreaty."

More specifically, the facts are these: Under a construction permit granted February 4, 1953, Midwest Broadcasting Company began the construction of a UHF television broadcast station in Milwaukee, where there was already a VHF station affiliated with NBC. On August 21, 1953, as its station neared completion, Midwest made an

affiliation agreement with CBS, subject to the latter's unilateral right to cancel at any time on six months' notice.[1] A short time later Bartell Broadcasters began operating another UHF station—WOKY—in Milwaukee. The Bartell station was neither as elaborate nor as successful as Midwest's.

In January, 1954, Midwest was informed by a broker that, if and when the Federal Communications Commission adopted a multiple ownership rule which would permit George B. Storer to add a UHF station to the others owned by him, Storer would pay $2,000,000 for Midwest's station. About that time the latter began adding substantial improvements to its facilities.

CBS says it had faith in UHF, although general opinion in the industry was that it could not successfully compete with VHF. It therefore determined, later in 1954, to acquire a UHF station in Milwaukee, if and when the Commission should adopt the "5 and 2" rule,[2] which would permit it to do so. CBS had learned of Poller's efforts to sell the Midwest station for approximately $2,000,000 —a price it considered to be substantially more than the property was worth, and "completely out of line." Because of this, CBS chose not "to enter into any kind of trading" with Poller, but decided to attempt to acquire the other UHF station in Milwaukee. To that end, it employed one Thad Holt, an independent consultant, to obtain from Bartell an assignable option to purchase station WOKY. On July 29, 1954, Holt obtained such an option in his own name, without disclosing the identity of his principal. The option price was $335,000, which Holt said was arrived at by adding $50,000 to Bartell's investment. This option, which endured until October 1, 1954, was extended

1. Poller "continuously" pleaded with CBS to eliminate the provision for cancellation on six months' notice, but CBS refused. Poller said he used the CBS insignia "with trepidation," because of the tenuous nature of the network affiliation.

2. An amendment to the multiple ownership rule permitting one person to own five VHF and two UHF television stations.

to February 1, 1955. On September 17, 1954, the Commission adopted the 5 and 2 rule, effective October 22. On October 25, 1954, Holt assigned the option to CBS, which immediately exercised it.

Meantime, on October 21, CBS notified Midwest that its affiliation agreement would be cancelled as of April 22, 1955. The day after the notice of cancellation was given, Poller flew to New York and pleaded with officials of CBS to reconsider the termination of his company's affiliation, stating he had gone to great expense for a new studio and equipment, far more elaborate than that he would have required for a station which did not have a CBS affiliation. He stated he intended to continue television broadcasting in Milwaukee but he would not require for that purpose the expensive equipment he had contracted to purchase.

It was suggested that CBS might protect Midwest against the loss Poller feared by purchasing the physical equipment for which it had contracted and by taking over its studio lease. CBS agreed. It took over the studio and equipment, transferred to Midwest the equipment it had bought from Bartell, and paid Midwest the sum of $500,000. Midwest acknowledged that CBS had assumed liability for the work in progress and had paid it in full for the sums it had spent. Midwest also agreed to operate its station with the equipment formerly owned by Bartell, but failed to do so.

On February 17, 1955, CBS began operating its UHF station in Milwaukee, having paid Midwest $1,000 a day for advancing the cancellation date from April 22, 1955; but on March 21, 1959, the station was closed because its operation was marginal or unprofitable.[3] Midwest ceased broadcasting February 27, 1955, and in December, 1955, its cor-

3. When CBS acquired its Milwaukee station, there were two VHF stations in that market and a third went on the air thereafter. The result was that CBS was operating the only UHF station in the nation which was in competition with three VHF stations in the same market.

porate existence was terminated and all its assets were transferred to Lou Poller, who had been its president and sole stockholder.

In September, 1956, Poller filed this suit in the United States District Court against Columbia Broadcasting System, CBS-TV, an unincorporated division of CBS, J. L. Van Volkenburg and H. K. Akerburg, respectively president and vice president of CBS-TV, Bartell Broadcasters, and Thad Holt. As we have said, he charged them with conspiring to acquire the Midwest station in violation of the antitrust laws and at a price below its actual value, and charged CBS with monopolization and an attempt to monopolize.

Poller prayed for damages which he computed as follows: he sold the Midwest property, which he says was worth $2,000,000, to CBS for $500,000 and the transfer of the Bartell equipment, which he says was worth no more than $50,000; therefore he claimed damages of $1,450,000, trebled in accordance with the statute.

After extensive filings of interrogatories, depositions and affidavits, the District Court on June 9, 1959, entered an order granting the defendants' motion for summary judgment and dismissing the complaint as to CBS, Van Volkenburg and Akerberg. The opinion of the District Court is reported at 174 F. Supp. 802 (1959). Poller appeals.

The first question is—assuming without deciding that Midwest received less than the fair value of its station—whether Midwest was forced to sell by anything CBS did. Poller admits that the large value he placed on the Midwest station—greatly in excess of its cost—depended upon a CBS affiliation not subject to cancellation on six months' notice. Midwest did not have such an affiliation, and from the beginning CBS had refused to grant it. Poller realized from the outset the shakiness of his position and used the CBS insignia "with trepidation." His sale to CBS was not sought by the latter. On the contrary, CBS bought

Poller's equipment only at his importunity and to save him from the loss he thought he was about to suffer because he had improvidently contracted for construction of elaborate facilities which he would need only if he had the firm affiliation CBS had consistently refused to give him.

We are of the opinion that Poller's entreaty to CBS to buy his equipment was brought about by his own act of investing too heavily in the UHF equipment without having a firm network affiliation. Certainly he sought the sale and entered into it voluntarily.

If it be assumed, however, that Poller was forced to sacrifice his station by the acts of the alleged conspirators, other questions remain. Was there a conspiracy? If so, did the acts of the conspirators restrain trade or commerce in the television industry?

We turn to a consideration of the first of these questions: Did CBS and the individual appellees enter into a conspiracy in restraint of trade or commerce among the several States? The purpose of Section 1 is to prohibit joint action of two or more persons in combining their economic power and restricting competition. Poller's charge that CBS conspired with one of its unincorporated divisions and two of its employees is obviously unsound. It is in reality a charge that CBS conspired with itself. As the Fifth Circuit said in *Nelson Radio & Supply Co. v. Motorola:*[4]

> ". . . It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation. . . . [A] corporation and its subsidiaries can be guilty of a conspiracy in restraint of trade but that involves separate corporate entities. . . ."

4. 200 F. (2d) 911, 914 (1952), *cert. denied* 345 U. S. 925 (1953).

We conclude that CBS, its unincorporated division, and its employees were incapable of conspiring to restrain trade or commerce. The question becomes, then, whether CBS conspired with Bartell Broadcasters or Thad Holt to accomplish that purpose. Bartell and Holt are not now parties: the complaint was dismissed by the court as to the former upon its suggestion of improper venue, and the latter was never served with process.

The record shows Bartell gave an option to Holt without knowing he was acting for CBS, and did nothing more than sell its station as it was required to do by the option. Holt knew nothing of Poller or his station, and merely acted as agent for CBS in obtaining the Bartell option. In short, the record shows Bartell and Holt did not enter into a concerted scheme with CBS, but that the latter alone conceived and consummated the plan of acquiring the UHF station in Milwaukee which had been competing with Midwest.

Even if it be thought that Bartell and Holt combined with CBS to accomplish a common purpose, it does not seem to us that the purpose was to restrain trade or commerce. Poller complains that CBS cancelled Midwest's affiliation. It had the contractual right to do that. He complains that CBS chose to buy the Bartell station instead of his own. Certainly CBS did not act illegally in making that choice; it was under no sort of obligation to buy the Midwest station.

Then, when CBS saved him from the loss he might have suffered had he been left with the expensive facilities he had bought to meet a network affiliation he did not have, Poller complains he was forced by CBS to make a sacrificial sale. But his real complaint is that CBS would not eliminate the six months' cancellation clause from his affiliation agreement. He had never been led to believe this would be done; on the contrary, CBS had consistently refused to do it. Nevertheless, despite his "trepidation,"

Poller recklessly proceeded to incur large liability for expanded facilities he knew he would not need without the affiliation which had been continuously denied him.

It was said in *United States v. Colgate & Co.*, 250 U. S. 300, 307 (1919):

> ". . . In the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. . . ."

The Supreme Court has not departed from this rule, which has since been applied to broadcasting networks. In *Federal Broadcasting System v. American Broadcasting Co.*, 167 F. (2d) 349, 351, *cert. denied* 335 U. S. 821 (1948), the Second Circuit said:

> ". . . The principal ground urged in support of the charge of a boycott as a basis for the temporary injunction is that by concerted action the American and Mutual networks have cancelled their existing arrangements with the plaintiff. However, each did this pursuant to the terms of its agreement, and it is clear that if these defendants really acted individually and not jointly they were within their rights. A network is not a common carrier and each therefore had the right in the absence of concerted action to make such contracts for the distribution of its programs as it chose. . . ."

We conclude from the foregoing that the acts done by CBS and its co-defendants did not restrain trade or commerce. Hence, any injury to Poller's business and property caused by those acts was not the result of a violation of Section 1 of the Sherman Act.

The next question is whether CBS monopolized any part of the trade or commerce among the several States.[5]

As we have seen, CBS cancelled its affiliation with Midwest, bought the Bartell UHF station, later traded the Bartell equipment for that of Midwest, and also paid a large cash consideration, and then attempted to operate a UHF station in Milwaukee but failed and closed the station. These acts do not manifest an attempt to monopolize any part of the trade or commerce in the television industry. There was no attempt to monopolize UHF in Milwaukee, for Poller expressly said he would continue to operate there with the less elaborate Bartell equipment which would be sufficient for operation without a CBS affiliation. He accepted the Bartell equipment for that purpose. The failure of UHF in Milwaukee seems to have been due to the superiority of VHF competition.

Poller argues that each of the three national television networks—American Broadcasting Company, CBS and National Broadcasting Company—has a "vertical" monopoly, despite the fact they are fiercely competitive.[6]

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5. It has already been shown that CBS did not combine or conspire with any person or persons to do the acts which are the basis of Poller's complaint. Hence it did not "combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States." So, the question is limited, as stated in the text above, to the question whether CBS itself monopolized any part of the trade or commerce among the several States, or attempted to do so.

6. This notion is thus expressed in Poller's brief:

"It is a vital fact that because of physical limitations a particular station can broadcast only one program at a time, and because programs can only be received on a particular set one at a time there is an automatic exclusion by each program of all others at that time.

"Accordingly, the broadcast of a network program results in a vertical monopolization of every station throughout the country which receives and transmits that program at the time it is broadcast. The case is no different than it would be if because of physical law three concerns doing the same thing could reach into only one of three separate areas of space. In a sense,

The appellant says that, because a particular station can broadcast only one program at a time and only one program at a time can be heard on a receiving set, the broadcast of a network program results in vertical monopolization of every television station in the nation which receives and transmits it. This is the result of physical laws, and cannot be said to be monopolization by CBS or either of the other two networks.

Appellant goes on to argue that "In the great majority of markets where there are more than two stations each network requires that the station which takes its programs must become in effect its exclusive station"; that "The network does even more; it ties the stations to affiliation agreements which give the network exclusive control, yet keeps them dangling by the provision under which it can at will terminate the franchise upon which their financial fate depends."

Poller asserts that the power of CBS to own and operate television stations is "a potent monopolistic weapon."

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they would be competing with each other. But it is equally true that each of them would have an exclusive monopoly in the *entire* area that it could *possibly* embrace. It is no less a monopolization by any one merely because there is another outside area unapproachable by it, in which others likewise hold exclusive sway.

* * * *

"In the great majority of markets where there are more than two stations each network requires that the station which takes its programs must become in effect its exclusive station. Thus, by the coercive power of its programming the network has accumulated what it calls a chain of affiliated stations. These affiliates are no part of the network's investment of money or management. Others have made the investment; others have the burden of management; others run the risk of loss. But by virtue of the network having the program to sell, it requires by contract that these stations become in effect its subsidiaries. Thus, by an ironic perversion of the circumstances, the supplier dominates the customer. The network does even more; it ties the stations to affiliation agreements which give the network exclusive control, yet keeps them dangling by the provision under which it can at will terminate the franchise upon which their financial fate depends."

He characterizes it as an "element in the chain of monopoly practice." This power, he says, is "a potential threat against every station in the country." He expresses the belief "that, notwithstanding commission sanction,[7] the ownership of stations by networks effects such a concentration of control in the television industry as is violative of the antitrust laws."

Whether appellant's assertions are valid is not before us. Nor are we called on to review the 5-2 regulation. Rather, the question is whether, by the exercise of the right to acquire the Bartell station and the Poller equipment, CBS monopolized or attempted to monopolize interstate trade or commerce in the television industry; and, if so, whether Poller is thereby injured in his business or property. We perceive no monopoly or attempt to monopolize but, instead, an unsuccessful attempt to compete with other Milwaukee stations. For, after the Bartell acquisition, CBS had competition in Milwaukee from both VHF and UHF stations, and after acquiring Poller's equipment its station continued to have VHF competition to which it finally yielded. Of course, the competitive situation among the networks continued as before.

Assuming, however, (without deciding) that by either acquisition CBS was monopolizing or attempting to monopolize, we are of the opinion, for reasons stated elsewhere in this opinion, that Poller was not thereby injured in his business or property. Such injury as he may have sustained, we repeat, was caused by his improvidence in

7. The Commission sanction to which Poller refers is the 5-2 regulation of the Federal Communications Commission permitting one concern to own as many as, but not more than, five VHF and two UHF stations. The Commission has thereby held in effect that a network's ownership of that small number of stations is not against the public interest. As monopolization or an attempt to monopolize any part of trade or commerce among the several States is contrary to the public interest, the effect of the expert Commission's regulation is that such limited multiple ownership of facilities in the field it regulates does not violate Section 2 of the Sherman Act. Much weight should be given, we think, to the Commission's holding.

contracting for elaborate equipment to meet the requirements of a firm affiliation he knew he did not have.

Such is the monopolization with which CBS is charged. The essence of it is that the network keeps the stations "dangling" because of the provision it can cancel the franchise at will. That is to say, CBS is charged with monopolizing or attempting to monopolize some part of trade or commerce in the television industry because it kept Midwest "dangling" by retaining the right to terminate its affiliation on six months' notice. The retention of the right to cancel was lawful, and Midwest agreed to it.

All affiliation agreements between networks and stations are for fixed and limited terms, just as are station licenses granted by the Federal Communications Commission, but Poller does not claim this produced monopoly, even though the network is under no obligation to renew. It is the right of cancellation retained by CBS which he says kept his station "dangling." Although he was unhappy about it, Poller knowingly accepted affiliation subject to cancellation on six months' notice, as he could do no better. We see no reason for him to complain that the option to cancel was exercised.

Whether or not *Packard Motor Car Co. v. Webster Motor Car Co.*, 100 U. S. App. D. C. 161, 243 F. (2d) 418 (1957), is dispositive here, as the District Court held, that case is certainly relevant and indicative of the applicable doctrine. Several dealers in Baltimore had one-year contracts with Packard to sell its cars in that area. One of them informed Packard he would not continue as dealer unless he were granted an exclusive agency. Packard agreed, and refused to renew the franchises of the other dealers. One of them sued Packard for triple damages, alleging the transaction constituted a conspiracy in restraint of trade in violation of the Sherman Act. We held there was no contract or conspiracy to restrain trade within the meaning of the Sherman Act.

We have noted appellant's argument that the national networks have coercive and restrictive practices which extend the monopoly he asserts they have. These practices are: (1) the "must buy" policy which requires advertisers to buy time on a designated group of stations; (2) the "option time" practice under which affiliates contract to accept and broadcast all network programs offered to them during designated hours of the broadcast day.

We need express no opinion regarding these practices because it does not appear that either played any part in causing the injury to the business and property of Poller, of which he complains.

In sum, we hold the record shows there was no illegal conspiracy to restrain trade or commerce among the several States, that no restraint of such trade or commerce appears, and that no monopoly or attempt at monopoly was shown.

Affirmed.

WASHINGTON, *Circuit Judge, dissenting:* Poller's suit charges a conspiracy in restraint of trade in violation of Section 1 of the Sherman Act and a monopoly, attempted monopoly, or conspiracy to monopolize trade in violation of Section 2 of that Act. The District Court, without deciding whether the Sherman Act had been violated, gave summary judgment against Poller on the ground that his admitted injuries were *damnum absque injuria,* since CBS had a contractual right to cancel Poller's affiliation agreement and a legal right to choose to buy a rival station and to give that station (i.e., itself) the CBS affiliation. The majority of this court would affirm on the ground, as I understand it, that there was as a matter of law, on the record here, neither a conspiracy in restraint of trade nor a monopoly or attempted monopoly.

I disagree. In my view, Poller raises genuine issues of material fact as to whether there was a conspiracy against

him in restraint of trade and a monopoly. The charges he makes may, of course, appear ultimately to be without foundation in fact. But I think he is entitled to an opportunity to attempt to establish his charges before a jury, and that it was error to give summary judgment against him. Where the propriety of a summary judgment is involved, we are required, of course, to look at the case in the light most favorable to the plaintiff. *Calloway v. Hamilton National Bank*, 90 U. S. App. D. C. 228, 195 F. 2d 556 (1952).

1. Poller's allegation of conspiracy does not relate to the Columbia Broadcasting System (CBS) alone. It includes an unincorporated wholly-owned subsidiary, CBS-TV, two officers of CBS-TV, and other persons. It is clear that corporate officers can be members of a conspiracy with their corporation. The Supreme Court has so held. *Schine Theatres v. United States*, 334 U. S. 110, 116 (1948); *United States v. Yellow Cab Co.*, 332 U. S. 218, 227 (1947). The same cases establish that a corporation may violate the Sherman Act by conspiring with its wholly-owned subsidiaries. See also *United States v. Radio Corporation of America*, 358 U. S. 334 (1959); *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U. S. 211 (1951). In my view, CBS could conspire with CBS-TV, a wholly-owned, but not incorporated, "division" —as separate and distinct an organization as a wholly-owned subsidiary. Since there were other alleged co-conspirators, it is unnecessary, however, to rely on that ground. The outside persons, included as conspirators in plaintiff's charges, are not ruled out as possible conspirators merely because they are not presently defendants in this suit. A plaintiff is not required to sue and obtain judgment against every conspirator at his peril. Nor do I think that it is clear here, as do the majority, that these others were not conspirators. Whether or not they were is in issue, and the issue can only be resolved by proof.

2. In general, of course, a corporation may, without legal liability, deal with persons of its choice and exercise

the rights given it by its contracts. But clearly one of the qualifications to the free exercise of these rights is that they may not be used in a way which amounts to a conspiracy to restrain or to monopolize trade among the states. See *United States v. Parke, Davis & Co.*, 362 U. S. 29, 36-47 (1960).

Packard Motor Car Co. v. Webster Motor Car Co., 100 U. S. App. D. C. 161, 243 F. 2d 418, cert. denied, 355 U. S. 822 (1957), is not dispositive here. Upon loss of its franchise to sell Packard automobiles, the retail dealer involved could use its properties in a variety of ways, including the sale of other automobiles in competition with the Packard automobile. But a TV station operator can make only one use of his property, and, as will appear, without a network affiliation the property cannot be as profitably used, and the business may fail in consequence. Thus, the economic impact of CBS' action in cancelling Poller's network affiliation and buying the competing UHF station was highly damaging in a competitive sense. Furthermore, the Packard Company did not itself invade the retail market. Here CBS, primarily a wholesaler of programs, has entered the retail field.[1]

3. The essence of a violation of Section 1 of the Sherman Act is an unreasonable injury to, or restraint on, competition in a particular market in interstate commerce. Involved in this case are competitive interactions in three primary markets. First, there is the market in which television stations are bought and sold by station operators and entrepreneurs. Second, there is the local television broadcasting market in which viewers in particular areas accept or reject programs offered over local broadcasting stations.

1. For similar reasons, the other "refusal to deal" cases are equally inapplicable here. See, *e.g.*, United States v. Colgate & Co., 250 U. S. 300 (1919); Schwing Motor Co. v. Hudson Sales Corp., 138 F. Supp. 899 (D. Md.), *aff'd*, 239 F. 2d 176 (4th Cir. 1956), cert. denied, 355 U. S. 823 (1957). *Colgate* was of course severely limited in the Parke, Davis & Co. case, *supra*, if not sent "to its demise." See Mr. Justice Harlan dissenting, 362 U. S. at 49.

Although station profits do not come directly from payments by viewers, it can be fairly said that individual station operators compete for audiences which they are in effect able to sell to national and local advertisers. Third, there is competition among program producers for national advertisers. While local station owners may on occasion independently produce programs which merit the attention of advertisers seeking nationwide audiences, it is generally true that the three great television networks are the only competitors for advertisers seeking national program audiences. Poller says—and it seems reasonably clear on this record—that television stations in Milwaukee, especially UHF stations, cannot operate profitably without a network affiliation.

Through its operating division, CBS-TV, CBS is a primary producer of nationally broadcast television programs. While CBS owns several transmitting stations, CBS programs are generally presented to the viewing public over independently owned stations from which CBS obtains the right to use choice air time by means of affiliation agreements. At one time CBS-TV used the facilities of Poller's UHF station in Milwaukee under a network affiliation agreement. The present dispute arises because CBS-TV obtained an option to purchase the only competing UHF station in Milwaukee when it knew Poller's station was for sale, exercised its contract right to cancel Poller's network affiliation and then purchased Poller's equipment by giving him cash plus the poorer equipment of the Bartell station on which the option had been obtained. At the end CBS-TV had eliminated both Poller and Bartell from UHF telecasting in Milwaukee and it remained as the only telecaster in that field.[2] Competition in the entire market, comprising both UHF and VHF, was reduced.

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2. Whether or not CBS desired that result is a question of fact to be determined at a trial. In a case like the present, however, specific intent to restrain trade or monopolize may be unnecessary. See United States v. Griffith, 334 U. S. 100, 105 (1948).

The allegation that this was accomplished through a conspiracy has been denied and the question is in issue, subject to proof. It is further claimed by Poller that CBS was the only network willing to give relatively equal consideration to affiliation with UHF or VHF stations; that as a result, CBS had great effect on the entry or continued existence of UHF stations in the various local broadcast markets; and that by waiting for Poller and Bartell to develop the UHF market in Milwaukee and then using its economic and contractual power to establish itself in Milwaukee in their stead, CBS must have seriously discouraged new UHF operations elsewhere, for few entrepreneurs would be willing to pioneer a new field only to have the fruits of success taken from them by a network, without compensation. It is also claimed that the actions of CBS caused Poller's franchise to be reduced in value and his equipment to become useless and unmarketable elsewhere, and that CBS paid an unreasonably low price for his equipment.

In my view, the purchase and operation of the Bartell station as the exclusive CBS outlet in Milwaukee was an illegal restraint on competition if it forced Poller to go out of business under circumstances which discouraged or actually precluded the entry of new UHF stations into the Milwaukee TV market and other TV markets, thereby seriously retarding the development of the entire television industry.[3] Likewise, I think that the elimination of Poller in the way claimed could be deemed to be an elimination of competition by unfair means, an abuse which the antitrust laws were intended to preclude. *National Biscuit Co. v. Federal Trade Commission*, 299 Fed. 733, 738 (2d Cir. 1924); *United States v. Klearflax Linen Looms, Inc.*, 63 F. Supp. 32 (D. Minn. 1945). If Poller can prove these things to the satisfaction of a jury, I think he would be entitled to a verdict. He should be given that chance. On a motion for

3. Had CBS merely cancelled Poller's affiliation and given an affiliation contract to another independent Milwaukee station, it may be that no competitive evils would have resulted.

summary judgment the courts should be reluctant to deny the plaintiff his day in court when he alleges that he was forced out of business as a result of a conspiracy to eliminate him as a competitor. See *Slick Airways, Inc. v. American Airlines, Inc.*, 107 F. Supp. 199, 214 (D. N. J. 1951), app. dismissed, 204 F. 2d 230 (3d Cir. 1953), cert. denied, 346 U. S. 806 (1953). And this would seem particularly true where (as here) it is charged that the public has been deprived of maximum television service by a reduction of competition. See *Packaged Programs, Inc. v. Westinghouse Broadcasting Co.*, 255 F. 2d 708 (3d Cir. 1958).

My view is based in part upon *United States v. Radio Corporation of America*, 358 U. S. 334 (1959). There the United States asserted that RCA and its wholly-owned subsidiary NBC had threatened to cancel the NBC program affiliations of certain Westinghouse-owned stations, unless Westinghouse agreed to exchange its Philadelphia TV station for one owned by NBC in Cleveland, plus cash. The exchange was made and NBC was enabled to enter a new market area. The District Court granted summary judgment for RCA on the theory that the United States was precluded from bringing an antitrust action because the Federal Communications Commission had approved the challenged transaction. 158 F. Supp. 333 (E. D. Pa. 1958). The Supreme Court repudiated this theory, and reinstated the complaint. Although the Supreme Court did not expressly characterize as illegal the actions of RCA, its reversal of the District Court would appear to mean that the complaint adequately stated a cause of action. If the plaintiff's allegations are proved, the present case differs only in that CBS did not openly threaten Poller. If the actions of CBS had in fact had an irresistibly coercive effect on Poller, the absence of an overt threat would not be significant, and Poller's claim seems to be even stronger than that of Westinghouse, since here, unlike its case, the result of the CBS transaction was to reduce TV competition in the particular market area involved.

4. Similarly, Poller would be entitled to recover under Section 2 of the Sherman Act if he can prove, as he claims, that CBS had power to exclude him and other competitors in Milwaukee, and intended to use that power. See *United States v. Griffith*, 334 U. S. 100 at 107 (1948). "It is the exclusion of others from the opportunity of doing business that is regarded as monopolizing." *National Biscuit Co. v. Federal Trade Commission, supra* at 738.

The present record suggests that it may appear, if proof were offered, that once CBS had purchased Bartell's station, it had absolute power to exclude other independent UHF operators from Milwaukee so long as the other networks did not alter their attitudes toward UHF. Certainly, there are substantial indications that CBS had monopoly power over UHF in Milwaukee at the time it cancelled Poller's affiliation. Although CBS' station was in competition with Milwaukee VHF stations for viewers and thus not a monopolist in the viewer market, it may well be that CBS' economic strength gave it virtual monopoly power over the entry of new stations into Milwaukee. The possibility of new VHF entrants into Milwaukee may have been closed for practical purposes (apparently the third and last VHF channel in Milwaukee went into operation shortly after CBS entered Milwaukee). And by lowering local advertising rates or being able to do so, CBS may have been able effectively to preclude the entry into Milwaukee of new UHF independents who were simultaneously faced with the reluctance of other networks to affiliate with them. Proof of such facts would, I think, support a verdict in Poller's favor.

In reaching my conclusions as to both Sections 1 and 2, I have not failed to note that with respect to each of the claimed violations CBS made factual allegations which if proved might warrant a judgment in its favor, and that proof of Poller's claims will not be easy. But I think that he is entitled to go to trial.

JUDGMENT.

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF It is ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby, affirmed.

It is further ORDERED by the Court that appellees herein recover from appellant their taxable costs on this appeal, and have execution therefor.

Per Chief Judge Wilbur K. Miller.

Dated: Nov. 10, 1960

Separate dissenting opinion by Circuit Judge Washington.

APPENDIX B.

STATUTES INVOLVED.

Sherman Act.

"1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

"2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . .

"7. The word 'person', or 'persons', wherever used in Sections 1-7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

Clayton Act.

"4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1961

No. 45

LOU POLLER,

Petitioner,

v.

COLUMBIA BROADCASTING SYSTEM, INC., CBS TELEVISION, J. L. VAN VOLKENBURG, and H. K. AKERBERG,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

LOU POLLER, *Petitioner*, v. COLUMBIA BROADCASTING SYSTEM, INC., CBS TELEVISION, J. L. VAN VOLKENBURG, and H. K. AKERBERG, *Respondents.*	No. 690

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (JA 282-6)* is reported at 174 F. Supp. 802. The opinion of the Court of Appeals is appended to the petition, and is reported at 284 F. 2d 599.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

*References designated "JA" are to pages of the Joint Appendix

QUESTIONS PRESENTED

Whether Section 1 or Section 2 of the Sherman Act was violated by the owner of a television network which terminated an affiliation agreement with petitioner's station, in accordance with its terms, because the network had contracted to purchase another television station in the market over which it planned to broadcast its own programs.

Whether petitioner was injured in his business or property as a result of any violation of the Sherman Act when the respondent network exercised its contract right to terminate the affiliation agreement with petitioner's station.

THE STATUTES INVOLVED

The pertinent statutory provisions are adequately identified in the petition and are printed in an appendix thereto.

STATEMENT

Petitioner is the assignee of Midwest Broadcasting Company ("Midwest"), a dissolved Wisconsin corporation of which he was president. Respondent Columbia Broadcasting System, Inc. ("CBS") is the owner of television stations and the operator of a national television network. CBS Television is the unincorporated division of CBS in which its television operations were conducted. It was named as a defendant, but did not appear because it is not a legal entity capable of being sued. Respondent J. L. Van Volkenburg was an officer, and respondent H. K. Akerberg an employee, of CBS.

In August 1953, when Midwest was about to commence operation of a UHF television station in Milwaukee, it entered into an affiliation agreement (JA 57-60) with CBS which contained a clause, modifying the general form, per-

mitting termination thereof by CBS at any time on six months' notice (JA 59). Such a clause was included in many of the CBS affiliation agreements (JA 35-41, 159). It was intended to indicate to the affiliate that the relationship was a trial (JA 159, 161, 183), and it was so understood by petitioner (JA 95-9). Petitioner repeatedly attempted to have the six-month termination clause deleted from the contract, but without success (JA 94-5, 99). He used the CBS insignia with "trepidation" (JA 99).

CBS had long been an advocate of UHF television (JA 205); it had urged the Federal Communications Commission to allow networks and other multiple owners to acquire UHF stations without reducing the number of VHF stations which they might own (JA 252-7). CBS had announced that if the Commission were to adopt a proposed rule allowing a single licensee to own two UHF, in addition to five VHF, stations, CBS intended to acquire such UHF stations (JA 50, 257).

Anticipating the adoption of that proposed rule, CBS undertook in July 1954 to put itself in a position to acquire a UHF station in Milwaukee (JA 50). CBS had heard from a number of sources that petitioner had been trying to sell his station at a price which it considered greatly excessive (JA 152, 163, 179, 184, 199), and chose not "to enter into any kind of trading" with petitioner (JA 184). The company thought that it could buy station WOKY, the other UHF station in Milwaukee, owned by defendant Bartell Broadcasters, Inc., at a reasonable price (JA 152), and asked the defendant Holt to go to Milwaukee to negotiate for an assignable option to purchase that station (JA 91). Holt obtained such an option and assigned it to CBS (JA 89, 91-2). It was exercised in October 1954.

On October 21, 1954, the day before the new FCC rule became effective (JA 50), CBS gave Midwest notice

of the termination of its affiliation agreement. The following day, petitioner met with representatives of CBS in New York. He complained of the termination and stated that he had gone to great expense for a new studio and equipment (JA 50, 197-8). As a result of the ensuing discussion, an agreement (JA 61-84) was reached under which CBS took over such studio and equipment from Midwest, transferred to Midwest the equipment which it had bought from WOKY, and paid to Midwest the sum of $500,000. Petitioner acknowledged that he was reimbursed in full for the sums which he had spent on the studio and that CBS assumed the obligations of Midwest for an uncompleted building (JA 105).

When CBS acquired its Milwaukee station, there were two VHF stations in the market (JA 241-2). One of them was WTMJ, a primary NBC affiliate (JA 160, 238), which was "a giant" (JA 155). Later, a third VHF station went on the air, and CBS operated the only UHF station in the country that was in competition with three VHF stations in the same market (JA 209).

Nationally, CBS, at the time it contracted for the Milwaukee station, owned three stations out of a total of 386 that were then on the air (JA 52). It had affiliation agreements giving it option time on 127 stations, less than one-third of the total number on the air (JA 52). During the year 1954, CBS' share of the aggregate of time sales to national and regional advertisers represented 23.3% of the industry total of such sales (JA 86).

Television advertising is of three types: network, national spot and local. Network advertising is placed by national advertisers with a network organization; national spot advertising is placed by such advertisers directly with individual stations (JA 85). Of the fifty largest CBS television network customers in 1955, 78% also used national

spot advertising and 50% were included in the one hundred largest national spot advertisers (JA 54). During the same year, of the fifty largest CBS television network customers, 76% also advertised on at least one other television network, and 58% were among the fifty largest customers of at least one other television network (JA 54). Television is also in competition with all the other media of national advertising, including newspapers, magazines, billboards and radio (JA 54).

CBS operated the Milwaukee station for over four years, but closed it on March 31, 1959 (JA 272).

Petitioner's own statements reflect the inherent difficulties which confronted all UHF stations with VHF competition. His complaint (JA 13-14) refers to the fact that initially all television broadcasting was in the VHF band; and that when, in June 1952, the Federal Communications Commission authorized the use of UHF channels, few, if any, receivers in the hands of the public were equipped to receive UHF signals, so that "the success of UHF stations was extremely problematical." His opposing affidavit (JA 247-8) refers to the decrease in the number of UHF stations on the air from 121 in December 1953 to 84 in November 1958.

The present action was commenced in September 1956, eighteen months after the transaction between CBS and Midwest was concluded. The complaint (JA 6-23) charges a conspiracy to restrain trade in the television industry in violation of Section 1, and monopolization and attempt to monopolize in violation of Section 2, of the Sherman Act. It alleges (JA 22-3) that the fair value of the Midwest station was at least $2,000,000, and that Midwest received from CBS $500,000 in cash and equipment in the value of $50,000, so that it suffered damages in the sum of $1,450,000.

In September 1957, after respondents had answered lengthy interrogatories and had taken petitioner's deposition, they moved for summary judgment (JA 46). Petitioner took a number of depositions for use on the motion, and his opposing affidavit (JA 235-51) was not served until March 1959.

The District Court granted respondents' motion for summary judgment (JA 287), and the Court of Appeals affirmed.

ARGUMENT

This case presents no issue of general significance under the antitrust laws. There is no claim that a conflict of decisions between the circuits is presented. There is no important question which is likely to recur in another case. The only issue is whether established principles were appropriately applied to a particular situation.

Petitioner's claim that the Court below adopted novel doctrines regarding affirmative antitrust defenses rests upon a misconstruction of the Court's opinion. The Court clearly held that no violation of the statute was shown, and did not consider affirmative defenses to what otherwise would be actionable.

The case presents the simplest possible example of a unilateral determination by a producer as to the method of distributing its own programs in a single market. The decision below does not conflict with any decision of this Court. It is fully in accord with a large body of recent authority.

Petitioner had the fullest opportunity to develop his version of the facts in pretrial proceedings. As to the material facts, there is no issue. Essentially, petitioner's case under both Sections 1 and 2 rests on legal premises which

are plainly erroneous. Petitioner uses the terms "monopoly" and "monopoly power" in a loose, inaccurate sense. He disregards the uncontroverted evidence that television, both nationally and locally, was characterized by intense competition. Such competition exists between networks and between stations and with other advertising media. Of course, the "monopoly" of each program producer in its own programs, like that of a manufacturer in the products bearing his brand, is not the monopoly which the antitrust laws prohibit.

Dismissal of the case on summary judgment was proper, and in accordance with a large body of authority.

It would be obviously inappropriate for the Court in this private case, to which neither the Government nor the Federal Communications Commission is a party, to undertake the kind of general review of conditions in the television industry which petitioner requests. Industry practices which he criticizes are wholly unrelated to his alleged injury.

The lack of merit in the petition will be shown by considering in turn each of petitioner's asserted reasons for granting the writ.

1. There is no basis for petitioner's assertion that the Court below introduced new defenses of contributory negligence and estoppel in antitrust cases.

The Court held both that there was no violation of the Sherman Act and that, even if the Act had been violated, such violation was not the cause of the alleged injury of which petitioner complains. In the latter connection, the Court observed that petitioner's claimed loss resulted from his expansion of the station when he knew that he did not have a firm affiliation agreement, and that the high value

which he placed on his station depended upon his having such an agreement. The accuracy of these statements is not, and obviously cannot be, challenged, for they rest on petitioner's own admissions (JA 94, 95, 97-100).

That the Court did not, as petitioner claims, purport to recognize affirmative defenses to violations of the statute appears plainly from its opinion. The Court's discussion of the claim under Section 1 concludes (Appendix to Petition, p. 22):

> "We conclude from the foregoing that the acts done by CBS and its co-defendants did not restrain trade or commerce. Hence, any injury to Poller's business and property caused by those acts was not the result of a violation of Section 1 of the Sherman Act."

Similarly, with respect to Section 2, the Court wrote (p. 25):

> " . . . We perceive no monopoly or attempt to monopolize but, instead, an unsuccessful attempt to compete with other Milwaukee stations. . . . Of course, the competitive situation among the networks continued as before."

These explicit declarations that the statute was not violated rest on elementary antitrust considerations. They show the error in petitioner's claim that the Court "created new law" by the recognition of defenses to justify action which would otherwise have been illegal.

2. This case does not even approach the outer limits of *United States* v. *Colgate & Co.*, 250 U. S. 300. Certainly, nothing in the antitrust laws required CBS, when it decided to enter into the Milwaukee market, to buy petitioner's station rather than that of Bartell. Having elected to buy the Bartell station, CBS terminated petitioner's affiliation

agreement in accordance with its terms. The case presents an example, in its simplest form, of the exercise by a single producer of its right to select the outlet for its own product.

The decision below does not conflict with any of the decisions of this Court cited by petitioner. The termination of petitioner's affiliation agreement entailed no suppression of price competition among buyers of a producer's goods, such as was involved in *United States* v. *Parke, Davis & Co.*, 362 U. S. 29. In *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359, the manufacturer who cut off a dealer's supplies had been found in a prior action by the Government to have a monopoly (273 U. S. at 369). *United States* v. *Griffith*, 334 U. S. 100, and *Schine Chain Theaters* v. *United States*, 334 U. S. 110, involved the misuse in competitive markets of the power which the defendants obtained because they were monopolists with the only theaters in other markets. *United States* v. *Radio Corporation of America*, 358 U. S. 334, likewise involved more than merely the selection of an outlet in a particular market; the coercion there challenged was the termination and withholding of network affiliations in other markets in order to induce an exchange in a particular market. To the extent that *United States* v. *Columbia Steel Co.*, 334 U. S. 495, has any relevance, it tends to establish the legality of the degree of "vertical integration" that was effected by the action here challenged.

Petitioner's reference to "leverage power" is circular. It assumes the existence of the monopoly which petitioner seeks to prove. What CBS did was to exercise the right which it had specifically reserved to terminate the arrangement by which it was distributing its own programs in a single market, and to undertake such distribution through its own outlet. In holding that no violation of the Sherman Act was involved, the decision below is in

accord with a large volume of recent authority. *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F. 2d 418 (D. C. Cir.), cert. den. 355 U. S. 822; *Schwing Motor Co.* v. *Hudson Sales Corp.*, 239 F. 2d 176 (4th Cir.), cert. den. 355 U. S. 823; *Miller Motors, Inc.* v. *Ford Motor Co.*, 252 F. 2d 441 (4th Cir.); *Nelligan* v. *Ford Motor Co.*, 262 F. 2d 556 (4th Cir.); *Nelson Radio & Supply Co.* v. *Motorola, Inc.*, 200 F. 2d 911 (5th Cir.), cert. den. 345 U. S. 925.

The rule of these cases is not rendered inapplicable by the fact that CBS undertook itself to broadcast its programs in the market rather than select another station to do so. *Cf. Fargo Glass & Paint Co.* v. *Globe American Corp.*, 201 F. 2d 534 (7th Cir.), cert. den. 345 U. S. 942; *Interborough News Co.* v. *Curtis Publishing Co.*, 225 F. 2d 289 (2d Cir.). Indeed, that fact improved petitioner's situation. If CBS had changed affiliates, a course which concededly would have been legal (JA 108), it would have had no occasion to relieve petitioner of his recently incurred investment in studio equipment.

There is no merit in petitioner's charge that the important economic facts were considered irrelevant by the Court below. The record contains undisputed evidence as to the highly competitive conditions in the television industry, both nationally and in Milwaukee. To avoid the obvious reality of that competition, petitioner has resorted to definitions of the relevant market which are wholly unreal. The opinion below (Appendix to Petition, pp. 23-4, footnote 6) refers to his claim—which is not renewed in the petition—that CBS is a monopolist because, due to physical factors, each network has a "vertical monopoly" in its own programs. Here, the market which CBS is claimed to have monopolized is "UHF in Milwaukee" (Petition, p. 9), and that is the position which

petitioner's attorney took when he was pressed by the District Court to define the relevant market for the purpose of his monopoly charge (JA 275).

That position destroys petitioner's claim under Section 2. In view of the intense competition which CBS faced from the preferred VHF stations in the same city, UHF in Milwaukee is plainly not a relevant market for the purpose of that Section. *Cf. United States* v. *E. I. duPont de Nemours & Co.*, 351 U. S. 377.

In short, as to Section 1, the *Colgate* rule is clearly applicable, and petitioner's case under Section 2 rests on a fallacious concept of the relevant market. His argument under both Sections disregards the competitive situation among the networks, as well as the fact that the CBS station in Milwaukee faced competition from two, and later three, VHF stations with decided advantages over CBS,—competition to which it ultimately succumbed. The conclusion of the Court below that the failure of UHF in Milwaukee was due to the superiority of VHF competition accords with the well known facts of the industry which had previously been noted by that Court (*Greylock Broadcasting Co.* v. *United States*, 231 F. 2d 748, 749), and also with the allegation in petitioner's complaint (JA 13-14) as to the "extremely problematical" success of UHF stations.

3. An additional ground for the decision below that Section 1 was not violated is that the action of which petitioner complained was not the result of a conspiracy, but was the unilateral action of CBS.

The petition attacks one aspect of that decision. It asks that the writ be granted in order to review the holding that there can be no conspiracy between CBS and its unincorporated division, CBS Television. This request should be rejected for two reasons. First, the question need not be

reached, since the decision that there was no restraint disposes of the Section 1 claim. Secondly, petitioner's contention on the point is obviously unsubstantial. CBS Television is not a separate legal entity, but an administrative division of the corporation. In *Timken Roller Bearing Co.* v. *United States,* 341 U. S. 593, 606, Mr. Justice Jackson, dissenting, referred to a concession by the Government that there can be no conspiracy between a corporation and its unincorporated division. That position was reiterated in the Report of the Attorney General's Committee on the Antitrust Law (p. 35).

Petitioners position would make it impossible for any large corporation which is organized into separate departments to coordinate its activities. Any unilateral price action taken by a corporate division with the approval of top corporate management would be a "conspiracy". The publication by General Motors of a price scale for cars made by its several divisions would violate Section 1. This would read the conspiracy requirement out of the statute. *Cf. Nelson Radio & Supply Co.* v. *Motorola, Inc.,* 200 F. 2d 911, 914 (5th Cir.), cert. den. 345 U. S. 925.

4. Summary judgment was properly granted because there was no issue as to any material fact. The points on which it is claimed that the Court below erroneously accepted CBS' version of disputed facts are not conceivably determinative of the case. They are material only under petitioner's mistaken assumption that disparity in bargaining power alone creates a triable issue under the Sherman Act. CBS was under no duty to deal with petitioner for the purchase of his station. Its reason for not doing so is irrelevant.

The essential facts regarding the transaction are established by documents and are undisputed. Petitioner had the

widest latitude in conducting discovery proceedings, and the motion was not submitted to the Court until after those proceedings had been concluded. The issue presented is one of law, and the propriety of determining that issue on motion is established by abundant authority. *Cf. Schwing Motor Co.* v. *Hudson Sales Corp.*, 239 F. 2d 176 (4th Cir.), cert. den. 355 U. S. 823; *Syracuse Broadcasting Corp.* v. *Newhouse*, 236 F. 2d 522 (2d Cir.); *Interborough News Co.* v. *Curtis Publishing Co.*, 225 F. 2d 289 (2d Cir.); *Nelson Radio & Supply Co.* v. *Motorola, Inc.*, 200 F. 2d 911 (5th Cir.), cert. den. 345 U. S. 925; *Boro Hall Corp.* v. *General Motors Corp.*, 124 F. 2d 822, rehearing denied 130 F. 2d 196 (2d Cir.), cert. den. 317 U. S. 695; *McElhenney Co.* v. *Western Auto Supply Co.*, 269 F. 2d 332 (4th Cir.). See also *Packard Motor Car Co.* v. *Webster Motor Car Co., supra,* where a judgment entered on a verdict for the plaintiff was reversed.

5. Finally, petitioner would have this Court utilize this private action to review various practices in the television industry which are the subject of extensive regulation. He seeks to analogize such practices to those which were condemned in the motion picture industry in *United States* v. *Paramount Pictures Corp.*, 334 U. S. 131. Petitioner overlooks the fact that there is here no claim of a horizontal conspiracy among competitors, such was found in the *Paramount* case. He also overlooks the obvious impropriety of such a general inquiry in a private action, in which neither the Government nor the Federal Communications Commission is a party, and in which but a single narrow issue is presented.

The Court below was plainly right in holding that petitioner's alleged injury was not caused either by the "must buy" policy, by which time was offered to adver-

tisers on a designated group of stations, or by the "option time" practice, under which affiliates contract to accept network programs offered during designated hours. Cf. *Affiliated Music Enterprises* v. *Sesac, Inc.*, 268 F. 2d 13 (2d Cir.), cert. den. 361 U. S. 831. Nor, as was also held below, does this case call for review of the Commission rule authorizing a network to own a limited number of stations. The sole issue is whether the particular transaction in which CBS terminated petitioner's affiliation agreement violated either Section 1 or Section 2 of the Sherman Act. That issue was decided with full recognition of the principles established by this Court's decisions.

What the petition asks, in effect, is that, despite the highly competitive conditions which are shown by the record, this Court should adopt a rule retroactively outlawing network ownership of stations under all circumstances. Petitioner's plea is addressed to the wrong branch of the Government, in the wrong proceeding, and by the wrong party.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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FILE COPY

Office Supreme Court, U.S.
FILED
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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, [redacted] 1961

No. [redacted] 45

LOU POLLER,

Petitioner,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,
CBS TELEVISION, J. L. VAN VOLKENBURG,
and H. K. AKERBERG,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR THE PETITIONER.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1960.

No. 690.

LOU POLLER,

Petitioner,

v.

COLUMBIA BROADCASTING SYSTEM, INC., CBS TELEVISION, J. L. VAN VOLKENBURG, AND H. K. AKERBERG,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR THE PETITIONER.

OPINIONS BELOW.

The opinion of the District Court (R. 282-86) is reported at 174 F. Supp. 802. The opinion of the Court of Appeals (R. 290-307) is reported at 284 F. 2d 599.

JURISDICTION.

The judgment of the Court of Appeals was entered on November 10, 1960. The Petition for Certiorari was filed February 1, 1961, and was granted on March 20, 1961: 365 U. S. 840 (1961). The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646(1), 62 Stat. 928(1), 28 U. S. C. § 1254(1).

STATUTES INVOLVED.

The statutory provisions involved are Sections 1, 2 and 7 of the Sherman Act, Act of July 2, 1890, c. 647, §§ 1, 2 and 7, 26 Stat. 209, 15 U. S. C. §§ 1, 2 and 7; and Section 4 of the Clayton Act, Act of October 15, 1914, c. 323, § 4, 38 Stat. 731, 15 U. S. C. § 15. They are printed in Appendix A (*Infra*, p. 39).

QUESTIONS PRESENTED.

1. Where a national TV network purchased the UHF station of a competitor of its affiliate and then cancelled the affiliation and bought the affiliate's equipment, so that the network became the sole owner and operator of UHF in the area and thus excluded all other entrants into UHF in the area, is it proper to ignore all the evidence of the network's monopoly, attempted monopolization and conspiracy, on the ground that it had the contractual "right" to cancel the affiliation and the inherent "right" to purchase a station and therefore the admitted injury to petitioner was *damnum absque injuria*?

2. Is contributory negligence a defense to the Sherman Act; i.e., should the victim be denied redress because he had prospered and expanded his station with knowledge that the monopolist exercising its contract "right" might cancel the affiliation and eliminate him?

3. May a network, which produces and sells programs to stations, also own and operate stations, and is this vertical integration equivalent to the benign selection by a trader of the customer with whom he will deal?

4. Can an unincorporated subsidiary be a party to a conspiracy in restraint of trade, where it operates precisely like an incorporated subsidiary?

5. May summary judgment be granted against a plaintiff despite genuine issues of fact, because the court chooses to accept the evidence of the defendants and ignore the testimony in contradiction of it?

STATEMENT OF THE CASE.

This is a treble damage suit charging violations of Sections 1 and 2 of the Sherman Act.

Petitioner is the assignee of Midwest Broadcasting Company ("Midwest"), a corporation which owned and until February 25, 1955, operated a UHF (ultra high frequency) television broadcasting station (WCAN-TV) in Milwaukee, Wisconsin (R. 6, 235).

After a long freeze on the issuance of licenses for new stations, the Federal Communications Commission (FCC) in June 1952 made additional channels in the UHF band available for television. Midwest then obtained a permit for a UHF station in Milwaukee and on August 21, 1953, signed an affiliation agreement with CBS-TV for two years. CBS-TV reserved the unilateral right to terminate the affiliation at any time on six months' notice (R. 15, 59).

In December 1953 the FCC gave notice of a proposed rule that would permit the ownership by a single licensee of 7 television stations not more than 5 of which could be VHF (very high frequency) stations (R. 50).

There were then two other television stations in the Milwaukee market in addition to petitioner's station. One was a VHF station, affiliated with NBC and ABC (R. 238). The other, WOKY-TV, owned by Bartell Broadcasters, Inc., was a UHF station with no primary affiliation (R. 16).

By this time petitioner's station, WCAN-TV, was operating profitably, and was praised by CBS-TV as an outstanding example in the country of a successful UHF operation (R. 15, 241).

As a result of his success petitioner had embarked on an extensive expansion program of which he kept CBS fully informed. He acquired new and improved equipment for his station and was building a new studio (R. 18, 242). Storer Broadcasting Co. had manifested an interest in acquiring petitioner's station for $2,000,000 if the pro-

posed FCC rule was adopted, and petitioner had indicated his willingness to sell (R. 17, 239).

In July 1954 the CBS respondents, in anticipation of the new FCC rule, determined to acquire for themselves an option to buy a UHF station in Milwaukee (R. 19, 32). They therefore engaged the services of defendant Thad Holt (R. 19, 50). On July 26, 1954, Holt met with CBS representatives in New York, and from there went directly to Milwaukee (R. 91). Three days later, without disclosing CBS' interest in the transaction, Holt secured from Bartell an option in his own name to purchase station WOKY-TV (R. 91). Neither Holt nor CBS ever approached petitioner regarding the purchase of his station, although CBS knew of petitioner's discussions with Storer and had tried to dampen Storer's interest in petitioner's station by refusing to give assurance that the CBS affiliation would be continued (R. 163-65, 178-79).

On September 17, 1954, the FCC adopted its proposed rule, effective October 22, 1954 (R. 17, 104). Late on October 21, 1954, a few hours before the rule became effective, CBS-TV telegraphed petitioner that his affiliation was cancelled (R. 20, 50).

Petitioner immediately flew to New York and pleaded with the officials of CBS for an explanation and reconsideration of their cancellation of his affiliation (R. 50, 223-24). As a result of this meeting an agreement was entered into whereby CBS acquired the physical assets of petitioner's station and an assignment of his studio leases and transmitter site, in exchange for $500,000 and the physical equipment CBS was acquiring from Bartell. The agreement contained a recital that petitioner would continue to operate a television station in Milwaukee (R. 51, 61). This was made a condition of the deal by CBS although both parties knew the improbability that Poller could continue operations (R. 21) and he himself considered the statement nothing more than "window dressing" (R. 105-6).

On October 25, 1954, Holt assigned his option to CBS and CBS immediately exercised it (R. 20, 92).[1]

On February 17, 1955, CBS-TV commenced operation in Milwaukee under the call letters WXIX-TV; and by February 27 petitioner ceased broadcasting. CBS, the producer of national TV programs, thereupon became the sole UHF station owner and operator in the Milwaukee area (R. 6, 21-22, 235).

In September, 1956, petitioner brought the present action on the ground that the events in Milwaukee constituted a conspiracy to eliminate the only two UHF stations in Milwaukee,—petitioner's and Bartell's, and at the same time to coerce petitioner to sell out to CBS at a distress price through cancellation of the CBS affiliation, with the result that CBS would become the sole UHF broadcaster in the Milwaukee market. Petitioner further claimed that respondents' conduct constituted monopolization and an attempt to monopolize.

Damages are claimed in the amount of $1,450,000 and the trebled amount of $4,350,000. This represents the difference between the actual value of petitioner's equipment and facilities (at least $2,000,000) and the amount at which CBS acquired it ($500,000 in cash and used equipment of WOKY-TV worth no more than $50,000) (R. 23, 226).

The District Court, Holtzoff, J., granted summary judgment against petitioner on the ground that assuming that the Sherman Act had been violated and a conspiracy had been shown, nevertheless, petitioner's admitted injuries were *damnum absque injuria* because CBS had simply exercised a contractual right to cancel petitioner's

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1. The FCC approved CBS' acquisition of station WOKY-TV by the narrow division of three to two, with a strong dissent by Commissioners Hennock and Bartley that this transfer would not serve the "public interest, convenience and necessity". 11 *Pike & Fischer, Radio Regulation* 913. One of the affirming Commissioners was Lee to whom Dr. Stanton had previously spoken, *ex parte*, concerning CBS' acquisition of a UHF station in Milwaukee (R. 173-76).

affiliation and a legal right to choose to buy a station, albeit a rival station which CBS-TV now would operate as a self-affiliate (R. 282).

The Court of Appeals (Judges Prettyman and Washington) heard argument on February 5, 1960, and on its own motion, reargument on May 23, 1960, before Wilbur K. Miller, C. J., Prettyman and Washington, JJ. On November 10, 1960, the Court of Appeals affirmed the judgment of the District Court in an opinion by Chief Judge Miller (R. 290). A vigorous dissent was filed by Judge Washington (R. 301).

SUMMARY OF ARGUMENT.

1. Concentration of control is much more pronounced in the television industry than it was in the motion picture industry before *United States v. Paramount Pictures*, 334 U. S. 131 (1948). The three national networks dominate the industry. The demand for nationwide television advertising so far exceeds the available facilities that the networks are assured of continued co-existence. Since each network uses only one local outlet for its programs, and in the vast majority of significant markets there are more than two stations, CBS is assured an outlet for its programs without competing with the other networks.

By the coercive power of its programming CBS has accumulated a chain of affiliated stations, each of which is bound to it by a standard affiliation contract, although the network is free to cancel the affiliation at its pleasure. Each station is thus made an "exclusive dealer" whose continued existence is dependent on his supplier; if his affiliation or "dealership" is cancelled, the network product, without which he cannot compete and for which there is no substitute, is taken from him. CBS' control is tightened by "must buy" and "option time" requirements which are fastened on its advertisers and affiliates, respectively.

The FCC has permitted CBS to own and operate stations. This arms CBS with monopolistic power to acquire the station of any of its affiliates at its own price because of the inherent threat that otherwise the network will cancel the affiliation. The number of stations which the network may own and operate is limited; but the existence of the power to own stations is a potential threat against all affiliates. CBS itself admits the extraordinary extent of this power by claiming that it will never negotiate with an affiliate on the price of his station for fear that it may be accused of grinding down his price by the threatened cancellation of his affiliation.

2. CBS admits that the television industry is "bursting at the seams" because the VHF channels are not enough to meet the demand. UHF concededly is the only source for expansion and potential competition in the television industry.

Poller was outstandingly successful with UHF in Milwaukee, and an extraordinary proportion of the television sets in Milwaukee had been converted to receive UHF. CBS praised his skill and enterprise.

CBS entered the Milwaukee market, where Poller, its affiliate, was highly successful, and wiped him out. By giving Poller notice of the cancellation of his affiliation after obtaining an option to buy Bartell, CBS forced Poller to turn his equipment over to CBS at its price, far less than it knew he otherwise could have obtained for his going, successful station. In the one combined act CBS thus killed off both UHF operators and emerged as the sole UHF owner and operator in Milwaukee.

3. CBS' use of its network power to eliminate both UHF operators in Milwaukee and to emerge as the sole owner and operator of UHF there restrained competition in violation of Section 1 of the Sherman Act. It is no excuse that in its contract with Poller it gave itself the right to cancel his affiliation. The notice of cancellation was part of its plan to force his sale to CBS at a distress price. The inference is clear that CBS expected him to plead for pity when he received the notice, and all that followed was what CBS must have planned. Principles governing customer selection are inapplicable here because CBS, a wholesaler of programs, itself used the leverage of its network power to enter the retail field. This is especially so where, as here, it eliminated the only independent UHF operators and reduced the number of UHF stations from two to one. In addition to destroying Poller and becoming the sole UHF operator in Milwaukee, CBS seriously discouraged any other independents from pioneering with UHF in Milwaukee or elsewhere in the country.

4. CBS' acquisition of a station in the Milwaukee market by itself constitutes an unreasonable restraint of trade, which directly injured Poller. The acquisition eliminated all local competition for the CBS product. It also resulted in the removal of all future affiliation possibilities in Milwaukee. In addition, CBS' ownership of a station inevitably suppressed competition because it was incompatible with national spot advertising, it increased CBS' leverage power over national advertisers, and automatically removed the formerly independent station from any possible competition by the other networks for its facilities.

Vertical integration is especially objectionable in TV, probably the most important medium of mass communications. Control of the airwaves should be in as many independent hands as possible.

5. The conspiracy which has been shown does not fail for want of parties capable of conspiring. CBS' economically independent division, CBS-TV, is a party capable of conspiring with its parent, CBS, Inc. It is treated by CBS in exactly the same manner as its incorporated subsidiaries. Bartell furthered the conspiracy after learning of its existence. Holt, an independent businessman, was one of the main actors in consummating the plan and had an independent financial interest in it.

6. CBS' conduct in Milwaukee violates Section 2 of the Sherman Act. Once CBS had purchased Bartell's station it had absolute power, by its ability to lower advertising rates and operate its Milwaukee station at a loss, to exclude other independent UHF operators from Milwaukee. The other networks, by virtue of their preferred VHF affiliations in Milwaukee, would not affiliate with any independent UHF stations.

7. The court below on summary judgment chose to accept CBS' explanation of the facts. It concluded that CBS did not negotiate with Poller because it considered his price out of line, despite CBS' own testimony which justi-

fied the conclusion that its refusal to negotiate was the result of its plan to "grind down" the affiliate's price by buying across the street. It concluded that Poller sought the sale to CBS because he flew to New York, and it refused to consider the fact that Holler was irresistibly coerced to do so. It concluded that Poller's expansion of his station was "improvident" and was the cause of his injury, despite CBS' own testimony that Poller was an aggressive and alert operator who was highly successful. And, finally, it concluded that CBS did not desire to restrain competition, solely because it extracted from Poller a formal and meaningless representation that he would continue in business.

ARGUMENT.

I. CBS Used the Leverage of Its Network Power to Eliminate Poller and Bartell Through Cancellation of Affiliation and Acquisition, and Thereby Restrained Trade and Acquired Monopoly Power in Milwaukee.

A. The Network and Its Leverage Power.

Today the television industry is in a stage which closely resembles that of the motion picture industry before *United States v. Paramount Pictures*, 334 U. S. 131 (1948). Indeed, the concentration of control is much more pronounced in the television industry.

There are only three national networks. In 1955 when CBS acquired WOKY-TV the three networks controlled 69.9% of the national television advertising market. CBS' share alone was 33.4% and this was almost as much as NBC and ABC combined (36.6%). CBS and NBC together accounted for 62.1%. CBS alone controlled 46.5% of network time sales, exclusive of national spot sales, and CBS and NBC combined controlled 88% (R. 250). Moreover, of the fifty largest CBS television advertisers, 76% also advertise on at least one other television network and 58% are among the fifty largest customers of at least one other television network (R. 251). There is thus ample demand by advertisers to insure the continued co-existence of the three networks.

Each of the three networks uses only one local outlet for its programs. Since there are at least three stations in the vast majority of significant markets, competition between the networks for outlets for their programs is virtually non-existent. Instead, whatever competition exists is between the stations for affiliation with the network, for the national advertising dollars are almost entirely in the hands of the networks.

By this use of the coercive power of its programming CBS—and each of the other two networks—has accumulated what it calls a chain of affiliated stations. In granting the affiliation the network requires the station owner to become an "exclusive dealer". His continued existence is dependent on his supplier; if his affiliation or "dealership" is cancelled, the network product, without which he cannot compete, is taken from him.

Paralleling the motion picture industry's "block booking", the networks have solidified their position by the imposition of "must buy" and "option time".

"Must Buy".

CBS has a policy which requires that network advertisers *must buy* time on a *group* of stations designated by the network.[2] This is the minimum. Without it the advertiser can buy no time whatever. Colloquially and quite accurately the practice is known as "must buy" and the stations are called "must buy" stations.

The "must buy" requirement forces an advertiser to accept television coverage that he may not want in order to get the coverage he does want. It manifestly constitutes an illegal tie-in arrangement. *Northern Pacific Railway Co. v. United States*, 356 U. S. 1 (1958).

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2. Since this action was begun significant developments have occurred which would warrant a change to the past tense in the treatment of "must buy". On November 27, 1958, CBS announced to its affiliates that effective March 1, 1959, it would no longer pursue the "must buy" policy, but instead would require a "minimum buy" by which network advertisers would be obliged to contract for a minimum amount of *dollars* of advertising if they desired to have any network advertising at all (R. 245-46). On January 7, 1959, NBC also announced abandonment of its "must buy" policy effective March 15, 1959, and the institution of a "minimum buy" plan (R. 246). ABC has enforced a "minimum buy" for some time.

However, since the practice was still in effect at all times pertinent to this case, the present tense has been retained. It is not necessary at this time to determine the difference, if there is any, between "minimum buy" and "must buy".

"Option Time".

CBS is able to enforce its "must buy" requirement because of another practice, one which it imposes on its affiliates, known as "option time".

The "standard" affiliation contract between the network and its affiliates provides that, subject to certain conditions, the affiliate must accept and broadcast all programs offered to it by the network during designated hours of the broadcast day. The hours thus granted to the network are known as network "option time".[3] These are, of course, the most desirable segments of the station's broadcast time.

"Option time" is virtually identical to the "block booking" practices so severely condemned in *United States v. Paramount Pictures,* 334 U. S. 131, 156-57 (1948).[4] Indeed, "option time" is even more virulent than block booking. It not only commits the station in advance to take a whole block of programs, but also constitutes a combination or arrangement between the network and the affiliate to shut out the programs of possible competitors of the network.

These illegal "must buy" and "option time" practices do not, of course, by their mere existence, confer a cause of action on petitioner. They are, however, powerful evidence of deliberate practices by the network in the acquisition of additional power beyond that which is inherent in the nature of the network itself. For the broadcast of a network program inevitably results in a vertical monopolization of every station throughout the country which receives and transmits that program at the time it

3. The standard option time clause is contained in Poller's affiliation contract (R. 57-58).

4. The Department of Justice has notified the FCC, in response to the FCC's request for "a formal opinion of the Attorney General on the applicability of the antitrust laws to the option time practice", that "viewed either as an 'exclusive dealing' or 'tying' device, the Commission's own findings require the conclusion that option time runs afoul of the Sherman Act". 18 *Pike & Fischer, Radio Regulation,* 1801, 1809.

is broadcast. It results from the physical fact that a particular station can broadcast only one program at a time. The case here is no different from what it would be if because of physical law three concerns doing the same thing could each reach into only one of three separate areas of space. In a sense they would be competing with each other. But it is equally true that each of them would have exclusive control in the *entire* area that it could *possibly* embrace. It is no less control by any one merely because there is another outside area unapproachable by it, in which another likewise holds exclusive sway.

Thus CBS dominates the stations in its network. It has added to the inherent power it has over each station in its role as a network by its establishment of "must buy" and "option time" which it has embedded in its affiliation agreements. The affiliation agreements themselves keep the stations dangling on the good will of CBS by the standard provision for cancellation at the will of the network. So it is that each station which is part of the network, although in name independent, is completely at the mercy of CBS. The station must rely on CBS for its programs, its advertisers and its audience. And inevitably, it lives in fear of CBS' disfavor, which may result in the arbitrary cancellation of its affiliation, on which all has been made to depend.

B. The Network's Ownership and Operation of Stations Is the Ultimate Weapon in Its Control Over Its Affiliates.

The power of the network over its chain of affiliated stations is vastly increased by the network's ownership and operation of stations on the same level as its affiliates. So potent a weapon would be direct ownership of an entire network of stations that the FCC has forbidden ownership of more than a limited number by any one party.[5]

5. Section 3.636 of the FCC Regulations provides: ". . . The Commission, . . . will in any event consider that *there would be such a concentration of control contrary to the public interest,* con-

In doing this it has recognized that on the strict merits the bar might well be absolute and the networks forbidden to engage in any station operation.[6] Notwithstanding this limitation by the FCC, the evil of network ownership remains, because it exists as a *potential* threat against every station in the country.[7] To the fear of an affiliate that the network may cut off his affiliation, is now added the ultimate fear that the network may become a competing station operator and with its superior economic power easily crush the affiliated station. Moreover a network which purchased a station in competition with its affiliate would not permit the affiliation to continue (R. 168, 201). Acquisition of a station by the network inevitably, therefore, means cancellation of the local affiliation (R. 41).

It does not matter that the number of stations which the FCC will permit the network to own and operate is limited. For every affiliate lives in the shadow of the fear that the network may acquire a station in *his* market. It does not diminish the power of one who possesses a few atomic bombs that everyone he threatens knows that he cannot use the few bombs against all; for the universal fear to exist it is enough that he can use them against any one of those who are threatened.

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venience or necessity *for any party* or any of its stockholders, officers or directors *to have a direct or indirect interest in*, or be stockholders, officers, or directors of, *more than seven television broadcast stations*, no more than 5 of which may be in the VHF band". (Emphasis added.)

6. In the 1941 Report on Chain Broadcasting the FCC stated (at p. 67): "Assuming that the question were presented as an original matter at this time, the Commission might well reach the conclusion that the businesses of station operation and network operation should be entirely separated."

7. Salant, a Vice President of CBS, has acknowledged that the power of CBS to acquire stations had created a "risk" to affiliates to which obviously they would not be subject in the absence of that power (R. 221). He also recalled instances where affiliates expressed anxiety over CBS "buying in the market" of the affiliate at a time when CBS had not yet acquired the maximum number of stations (R. 221-22).

C. CBS Used the Leverage Power of Its Network to Acquire Poller's and Bartell's Stations and So Emerge in Sole Control of the UHF Market in Milwaukee.

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1. *UHF Is the Only Source for Expansion and Potential Competition in the Television Industry.*

No one can doubt that UHF offered—as it still does—the only hope for competition in television. As early as 1945 the FCC recognized the inadequacy of VHF channels to provide a nationwide competitive television system and declared the development of UHF to be essential to achieve that objective (R. 235-37).

Salant, Vice-President of CBS, admitted that it was necessary for UHF to grow and expand because:

> "VHF had grown and expanded about as far as it could and *we are bursting at the seams in this business.* Broadcasting has to find some place else to go and *the twelve VHF channels don't provide sufficient room for all the competition.*" (Emphasis added.) (R. 204)

With the failure of UHF only "trouble" could be envisaged:

> "As long as we don't have enough room to allow for more stations that the economy will support, there is going to be trouble because *there is some degree of artificial*—artificial in the sense of limitation of spectrum space, *artificial restriction on the normal growth that the industry could stand.*" (Emphasis added.) (R. 204-5)

It is undisputed, therefore, that the success of UHF is essential to restore competition in the television industry.

2. *Poller's Operation in Milwaukee Was the Prize Example of UHF's Prospect for Success.*

Against a background of mounting failures and forecasts of doom for UHF, CBS paid a deserved tribute to the unique and outstanding success achieved by Poller in Milwaukee.

In 1954 Dr. Stanton, CBS' President, testifying before the Potter Committee, made complimentary reference to Poller's WCAN-TV as an example of a "vigorously and aggressively managed new station" which was doing well.[8]

Salant described Poller thus:

> ". . . Lou Poller represented to me a new generation of broadcasters, the young, aggressive, alert guys that hadn't gotten to taking things for granted in pushing buttons. They were really doing a job." (R. 203)

He regarded Poller as "just the kind of guy who stood a chance of making a go at it" in an "intermixed" market (R. 204). This was because of "his aggressiveness, his alertness. He's a hard fighter" and a "man of ability" (R. 204).

Salant had only praise for Poller's equipment and facilities which later fell into CBS' hands. It had been "skillfully and economically acquired", and was "better and more" than that of Bartell, his competitor. Poller "had a much better, spanking clean studio, which is important to us", and he had "good, clean, first-rate equipment" (R. 226).

The praise which CBS thus lavished on Poller is shown to have been fully merited by the facts. Such extraordinary progress had been made that within six months after Mid-

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8. Poller Affidavit (R. 241). Hearings before the Subcommittee on Communications, Committee on Interstate and Foreign Commerce, United States Senate, 83rd Cong., 2d Sess., p. 975. See also Stanton's testimony that Van Volkenburg, President of CBS-TV, ". . . thought that Poller was a very promotion-minded, sales-minded, aggressive station operator" (R. 150-51).

west began broadcasting over 60% of the 260,000 television sets in the Milwaukee area were converted to UHF in order to be able to receive the programs of WCAN-TV. Public acceptance of WCAN-TV and UHF increased continuously and by October 1954 almost 90% of the television sets in Milwaukee had been converted (R. 15). Since conversion of VHF receiving sets to UHF involves an expense of $20 or more per set (R. 254) it is clear how strong the demand had become for UHF reception in the Milwaukee area.

Milwaukee thus was a "market of substantial size where UHF had a chance" to succeed (Salant, R. 187). It had a station operator who was able, alert, aggressive and promotion-minded enough to make it succeed.

It was this market which CBS determined to acquire for itself and bring under its sole control.

3. *CBS Used Its Power to Acquire Poller's Station and Monopolize UHF in Milwaukee.*

UHF was the only source of potential competition to CBS as a network, and it was in Milwaukee that UHF under Poller's management had achieved its outstanding success. It is precisely the Milwaukee market that CBS determined to enter, there to acquire exclusive control of UHF. This it did by acquiring a binding option on Bartell's franchise and then cancelling Poller's affiliation. Since Poller was dependent on the CBS affiliation, there fell into CBS' lap like a ripe fruit the new and modernized studio and facilities that Poller was at that very time constructing. Common sense compels the conclusion that the cancellation of Poller's affiliation and the acquisition of Bartell's franchise were one transaction. This common sense conclusion is specifically acknowledged to be correct by CBS itself.[9] It is equally clear that the notice of can-

9. From CBS' point of view these two events were part of the one transaction of going into Milwaukee (Stanton, R. 168; Salant, R. 201).

cellation of Poller's affiliation was given with the intention that CBS could then arrange to acquire Poller's equipment and studio at its own price, instead of the price of $2,000,000 it already had reason to believe Storer Broadcasting Co. was willing to pay. And at the same time, it would eliminate UHF competition in Milwaukee.

It would be strange enough, if CBS favored the growth of UHF, that it should invade Milwaukee, where UHF already was prospering under Poller, its own affiliate. It is stranger still that on deciding to invade Milwaukee CBS should ignore its affiliate, Poller, and instead should go to his competitor, Bartell, and negotiate for the purchase of Bartell's franchise. Even more remarkable is this because CBS knew that Poller had already been offered $2,000,000 by Storer for his station, whereas CBS had no indication whatever that Bartell intended to sell its station.[10] Moreover, CBS knew that Poller's station had the better equipment, whereas Bartell's equipment was useless to it.[11] *One searches the Record in vain for any satisfactory explanation by CBS of why it decided to acquire Bartell's station and leave Poller stranded and unaffiliated.* It has tendered an explanation. On its explanation CBS stands condemned. It claims that it has a policy never to buy a station from an affiliate except at the full price the affiliate first asks (R. 200-01, 279-80). CBS had heard indirectly (Stanton, R. 152) that Poller wanted "in excess of $2,000,000" for his station (Stanton, R. 179) and it was not ready to pay such a price (Stanton, R. 152, 164). For this reason, CBS claims, it never approached Poller, never negotiated with him, and never suggested a price it thought reasonable, even though he was its affiliate (Stanton, R. 153-54; Answer of Defendants to Interrogatory No. 3, R. 32). CBS explained that it established this extraordinary policy toward its affiliates because it feared that otherwise people would be "claiming that we were improperly using our affiliation

10. (R. 163-64, 178-79).
11. (R. 226).

to grind down . . . an individual's price", or "by telling a guy that if he didn't come down in price we'd go across the street and take the affiliation away from him, go across the street and buy" (Salant, R. 200).

To be affiliated with CBS, therefore, is *in CBS' own eyes* to be so inherently liable to be victimized by CBS that CBS fears to deal with the affiliate.[12] What more eloquent confession can there be that CBS enjoys monopolistic power? Here the confession is strengthened by the fact that CBS' conduct exactly parallels what it acknowledged to be improper: it refused to negotiate with its affiliate, but acquired the affiliate's assets after grinding down his price by going across the street and buying up his competitor and then taking his affiliation away from him. True, CBS did not utter words of threat to achieve the result; instead it let its coercive acts speak for it and garnered their benefits.[13]

Poller was powerless to avoid CBS' tactic of buying across the street to grind down his price. Neither of the other networks, NBC or ABC, was a rival for Poller's facilities;[14] and CBS had effectively discouraged outsiders like Storer from coming in by refusing on their request to give assurance that if they acquired Poller's station CBS would continue the affiliation.[15]

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12. Dr. Stanton was asked (R. 183-84): "Q. If you had wanted to acquire WCAN from Mr. Poller at a lower price than he demanded, wouldn't one of the elements which would depress the price have been your termination of his affiliation agreement?" He replied: "A. Yes, if we had chosen that course of action."

13. Salant's testimony provides the parallel:

"Q. Didn't you go across the street and buy a station and terminate his affiliation? A. We did indeed, but we didn't use it to bargain with Poller" (R. 201).

14. NBC already had an affiliation with WTMJ-TV, a VHF station. On August 24, 1954 it was announced that WTVW-TV, also a VHF station had become affiliated with ABC and would go on the air in October. It commenced broadcasting on the air in October. It commenced broadcasting on October 27, 1954 (R. 241-42).

15. (R. 26, 163-65, 178-79).

4. CBS Forced From Poller a Sham Agreement to Stay in Business.

The court below held that CBS did not intend to acquire exclusive control of the UHF market in Milwaukee (R. 297). It reached this conclusion by accepting CBS' claim that its benign intention was demonstrated by the words in the agreement of purchase that Poller would continue broadcasting even after CBS had taken over his equipment,—words which it must be obvious that CBS caused him to utter. CBS admits that this provision in the contract [16] was required by it (Stanton, R. 159; Salant, R. 222). It served no purpose of Poller's, but he had no bargaining power with CBS and had to acquiesce (R. 106, 224-25). And it must be remembered that Poller would never receive even the price CBS agreed to pay him for his studio and equipment unless and until the FCC approved of CBS' acquisition.[17] To obtain the proceeds of the agreement Poller, therefore, had to suppress any indignation or complaint; indeed he had to favor approval of CBS' action.

Is it possible seriously to believe that, having thrown himself on the mercy of CBS for some compensation out of the wreckage of his business and having gotten from it by Salant's intercession an agreement to pay him $500,000 plus the useless WOKY equipment for his facilities, Poller could dare refuse to sign what CBS required of him as an expression of his intention for the future? What a remarkable situation we have revealed when the purchaser of Bartell's station *insists* that Poller (who would be in competition with it) must promise that he will continue to

16. It is actually a recital in the agreement of November 12, 1954 in which CBS agreed to buy Poller's equipment and transfer to him the inferior Bartell equipment: "Whereas, Midwest has represented to CBS that Midwest intends to continue the operation of WCAN and all business incidental thereto and for that purpose CBS proposes to make the sale and transfers hereinafter set forth . . . ." (R. 61).

17. (R. 62).

operate his "competing" station. One need not be an uncloistered worldling to know why CBS insisted upon this provision. It was obviously written because of CBS' fear of the Sherman Act (R. 21), for it had no relevance to the contract of purchase of Poller's equipment. CBS denies that fear of the Sherman Act was in its mind; indeed it claims that it lives in innocence of the existence of the antitrust laws (R. 222). But the fear it felt is proclaimed loudly in the recital that Poller would continue in business even after it took away his equipment. This self-serving statement, obtained as it was as a result of CBS' coercive power, can serve no exculpatory purpose; instead it is strong proof of guilt. Nor do we believe that Poller is to be condemned because he acquiesced in an acknowledgment which both CBS and he knew had no reality. We freely admit that one who has the power to strip a man of his possessions will have no difficulty in also extracting from him an acknowledgment that the transfer was eminently agreeable to him.

5. *Poller Was Injured by CBS' Exercise of the Network Power It Had Acquired and Illegally Extended.*

The District Court, Holtzoff, J., assumed that the Sherman Act had been violated and a conspiracy had been shown, but nevertheless dismissed the petitioner's admitted injuries as *damnum absque injuria* because CBS had simply exercised two "rights": a contractual "right" to cancel petitioner's affiliation, and a legal "right" to choose to buy a station, albeit a rival station, which it now would operate itself (R. 282). The Court of Appeals came to a similar conclusion. Its main reason, however, was that petitioner was saved by CBS from a loss he was about to sustain because he had "improvidently" undertaken to expand his station facilities even though he knew that CBS had the right to terminate his affiliation (R. 294, 299-300).

The strange conclusion thus was reached that because Poller prospered and expanded while doing so, CBS' in-

jury to him is in some way to be excused, although it might not have been justifiable if he had not expanded. The Court of Appeals has excused the destruction of Poller's successful enterprise as if his prosperity was a kind of contributory negligence because it excited the cupidity of the network.

Of course, whether Poller expanded less or more cannot affect the question of causation, i.e., whether he was injured by the violation of the Sherman Act. The utmost effect it can have is in the determination of the amount of damage he suffered.

II. CBS Did Not Have an Unqualified "Right" to Cancel Poller's Affiliation and to Purchase Poller's Equipment and His Competitor's Station.

The court below, reading the agreement of affiliation in isolation from the surrounding circumstances, and invoking a kind of doctrine of estoppel by contract as a defense under the Sherman Act, held that any violation of Section 1 was excused because Poller accepted the agreement with its six months' cancellation provision. It extended *United States v. Colgate & Co.*, 250 U. S. 300 (1919), and held that what otherwise would have been a restraint of trade or monopolization was excused because CBS exercised its "rights",—an inherent "right" to buy Bartell's station instead of Poller's, and a contractual "right" to cancel Poller's affiliation (R. 295). It ignored the obvious effect of these acts *in combination*, even though CBS has admitted that they constitute one transaction (R. 168, 201).

The limits of the ever-recurring argument that a manufacturer or trader has the right to select his customer (*United States v. Colgate, supra*), were recently reviewed in *United States v. Parke, Davis & Co.*, 362 U. S. 29 (1960). Whatever may be the fullest reaches of *Colgate*, as explained in *Parke, Davis*, there is, of course, no "right", whether by contract or otherwise, to violate the antitrust law. As this

Court said in *Lorain Journal Co. v. United States,* 342 U. S. 143, 155 (1951):

> ". . . the word right is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified . . . . The right claimed by the publisher (to select its customers and to refuse to accept advertisements from whomever it pleases) is neither absolute nor exempt from regulation. *Its exercise as a purposeful means of monopolizing interstate commerce is prohibited by the Sherman Act* . . . ." (Emphasis added.)

Moreover, the *Colgate* rule does not even apply where a national network uses its leverage power as a network to enter into the business of operating a local TV station and thereby reduces competition and creates monopoly. In the motion picture cases this Court held that exhibitors could not use their power in non-competitive localities as levers to force distributors to grant them preferences in competitive localities: *Schine Chain Theaters v. United States,* 334 U. S. 110 (1948); *United States v. Griffith,* 334 U. S. 100 (1948).

In *United States v. General Motors,* 121 F. 2d 376 (7th Cir. 1941), GMC was held to have violated Section 1 of the Sherman Act because it used its monopoly power over the supply of its own automobiles and over the economic fate of its dealers, to compel them to use GMAC for the financing of automobiles.

In *Eastman-Kodak v. Southern Photo Materials Co.,* 273 U. S. 359 (1927), this Court held that Eastman-Kodak could not refuse to deal with the operator of a photographic stock house because he had refused to sell it his business, in consequence of which Eastman-Kodak opened its own retail outlet which it sought to make exclusive.

These cases make it clear that to use the dominant power possessed in one market to expand coercively in another market violates the antitrust law.

This case is not governed by *Packard Motor Car Company v. Webster Motor Car Company*, 243 F. 2d 418 (D. C. Cir. 1957),[18] on which the courts below relied. In *Packard*, the termination of the affiliation was held to be a simple exercise of a contract right only after a full examination of all the surrounding circumstances to ascertain the power position of the manufacturer and the economic effect of its action in the market. Here the court below erroneously extended its already controversial holding in the *Packard* case and exalted the contract right to a level that reduced the surrounding circumstances to immateriality. Here we are dealing with the dominant supplier rather than a weak competitor. In *Packard*, the manufacturer yielded to its powerful distributor which demanded the exclusive franchise. Here CBS yielded to no one and has favored no one—but itself. CBS did not select one rather than another "distributor" to carry on competition for it, as Packard did in Baltimore. On the contrary, CBS itself invaded the retail market by swallowing up the two independents and taking them over itself. Thus, by its own act two UHF stations were destroyed and CBS itself lamented that where there were two, there now was one.

The same situation as ours was presented in *United States v. Radio Corporation of America*, 358 U. S. 334 (1959). There the United States asserted that RCA and its wholly-owned subsidiary NBC had threatened to cancel the NBC network affiliations of certain Westinghouse-owned stations, unless Westinghouse agreed to exchange its Philadelphia TV station for one owned by NBC in Cleveland, plus cash. Under this threat the exchange was made and NBC was enabled to enter a new market area. The District Court granted summary judgment for RCA on the ground that

18. The *Packard* case followed *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F. Supp. 899 (D. C. Md. 1956).

the United States was precluded by the FCC's approval of the challenged transaction. 158 F. Supp. 333 (E. D. Pa. 1958). This Court repudiated that defense and reinstated the complaint. Although this Court did not expressly characterize as illegal the actions of RCA, its reversal of the District Court would indicate that the complaint stated a cause of action.

The present case differs from *RCA* only in the absence of an open threat by CBS. But, of course, an overt threat goes only to the strength of the evidence, and if CBS' conduct in fact had an irresistibly coercive effect on Poller, its avoidance of an overt threat is of no significance. Indeed, Poller's claim is even stronger than Westinghouse's, since here, unlike that case, the result was to reduce TV competition in the market area involved. The economic fact is that CBS eliminated Poller the moment it bought Bartell and thus emerged as the sole UHF owner and operator in Milwaukee.

The court below also ignored the obvious restraining effect of CBS' conduct on the future development of the UHF spectrum. CBS monopolized UHF in Milwaukee and became the sole operator there. Where previously there had been two UHF stations, now there was but one. Where there had been two independently operated UHF stations, now there was none. By waiting until Poller and Bartell had established the feasibility of UHF in Milwaukee and then using its leverage power to wipe them out, CBS inevitably discouraged any independent operator from coming into Milwaukee to face competition with the giant network which had just revealed its power to eliminate independent operators. The field was now closed and CBS held exclusive control. But the result was even more far-reaching. As succinctly stated by Judge Washington in his dissenting opinion:

> ". . . by waiting for Poller and Bartell to develop the UHF market in Milwaukee and then using its

economic and contractual power to establish itself in Milwaukee in their stead, CBS must have seriously discouraged new UHF operations elsewhere, for few entrepreneurs would be willing to pioneer a new field only to have the fruits of success taken from them by a network, without compensation." (R. 304-5)

Not only did CBS now have exclusive control of UHF in Milwaukee, and not only did it thereby seriously discourage prospective UHF operators elsewhere. It now held in its hands the future fate of UHF everywhere. For in the words of Salant, if CBS decided to abandon the station it had now acquired, "it would be the *kiss of death to UHF*" (Emphasis added.) (R. 207).

III. CBS' Contract by Which It Became a Station Owner in Milwaukee Violates the Sherman Act.

CBS' acquisition of a station in the Milwaukee market by itself—and wholly aside from its illegal use against Poller of the leverage of its network power—constitutes an unreasonable restraint of trade.

When CBS entered the Milwaukee market it eliminated all local competition for its product. Whereas previously there existed the possibility of competition between independent stations in Milwaukee for the CBS affiliation, this now was taken over by CBS itself. There was automatically excluded from competition one-third of the network shows available in the Milwaukee market. Indeed, realistically the removal of CBS affiliation was the same as the removal of all affiliation possibilities, since the other two networks were already affiliated with preferred VHF stations.

Moreover, ownership by CBS of a station inevitably suppresses competition. It suppresses competition in the national spot advertising market, since network ownership of a station is incompatible with the national spot advertising, which is in direct competition with network advertis-

ing.[19] It also reduces competition because network ownership of stations in the major markets increases the network's power over national advertisers and strengthens its "must buy" imposition on them. Finally, it automatically removes the station from the area of possible competition by the other networks for its facilities, and even makes it substantially inaccessible to non-network programs.

Of course, a manufacturer has the right to use his own product in his own outlet so long as he does not use the advantage resulting from integration to restrain the competition of others or to monopolize. But no manufacturer has a right deliberately to acquire control of a particular market for his product when the purpose or necessary effect is to exclude others from an important segment of that market. *United States v. Columbia Steel Co.*, 334 U. S. 495 (1948). The restraint on competition from such integration is particularly severe where, as here, there are only three networks, only a few stations can exist in any one competitive area, and a large investment is required for new entrants into the station operation business.

It is one thing to permit the development of a network with a chain of affiliated stations. But such expansion does not require that the network enter into competition with its own affiliates by invading the local broadcasting market. To do so is not to yield to the natural economic pressure for expansion; rather it is by calculated plan to tighten the network's already great power of control over all local broadcasting. It makes it ironical to speak of competition among local broadcasters in the acquisition of stations if for the choice stations they must compete, not with each other, but with their dominant supplier, the network itself.

This Court has consistently held that combinations vertically integrated to secure arbitrary market control violate the Sherman Act. *United States v. Paramount Pic-*

19. See Report and Order of FCC, October 30, 1959, Docket No. 12746, 24 Fed. Reg. 9003, 9006, holding incompatible and therefore improper the network practice of acting as agent for independent stations in the sale of national spot advertising while engaged in selling network advertising.

tures, 334 U. S. 131 (1948); *United States v. Lehigh Valley Railroad Co.*, 254 U. S. 255 (1920); *United States v. Reading Co.*, 253 U. S. 26 (1920).[20]

Television is the youngest and probably the most important medium of mass communication. Its enormous public influence was emphasized in the recent Presidential election. It is an industry, therefore, in which competition must be freely encouraged. Control of the airwaves should be distributed into as many independent hands as possible. Concentration of control of the industry strikes at the heart of a free society.

The practices already revealed in this case show how CBS' enormous concentration of economic power was built up. CBS' explanation of its unwillingness to negotiate with its own affiliate because of its fearsome power shows how the independent operator stands in relation to the network. To permit the three networks which control the entire industry today to invade the retail market is to increase the power they already have as network operators and render it absolute from top to bottom by vertical integration. The dangers which this inevitably creates require that there be an absolute bar against network ownership of any station.

CBS' contract of purchase of Bartell's station therefore violated the Sherman Act. It is this contract which set in motion the injury which CBS inflicted upon Poller. There is, therefore, no justification for the conclusion by the courts below that Poller's admitted loss was *damnum absque injuria*.

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20. As stated by this Court in *United States v. Yellow Cab Co.*, 332 U. S. 218, 227, 228 (1947), and restated in *United States v. Columbia Steel Co., supra* at 523: " 'Dominating power' over the cab operating companies 'was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control'. If that theory is borne out in this case by the evidence coupled with proof of an undue restraint of interstate trade, a plain violation of the Act has occurred."

IV. There Were Parties Legally Capable of Conspiracy With CBS.

(1) CBS-TV, an unincorporated division of CBS, is legally capable of conspiring with its parent. CBS-TV as an economic fact is no different from an incorporated subsidiary, long since held capable of conspiring with its parent.[21] CBS-TV was created by CBS to operate in an independent area of economic activity—television broadcasting—which for operational purposes may be deemed a separate industry, and basically CBS treats it no differently than any of its subsidiary corporations.[22]

Indeed, CBS-TV's independence has been recognized to such an extent that it was authorized to make contracts with corporate subsidiaries and others, *and even with other divisions* in its own name and on its own behalf (R. 45, 149).[23] Obviously, if the division can contract it can agree, and if it can agree it can conspire.

The Sherman Act is concerned with economic substance rather than technicalities of form. Where separate economic entities have been created and exist because they represent separate business activities they should be sub-

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21. *Timken Roller Bearing Co. v. United States*, 341 U. S. 593 (1951); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1951).

22. Each division has its own officers (R. 149, 192); the officers of both unincorporated "divisions" and incorporated "companies" are equally subject to the orders of the parent corporation (R. 193); both are equally subject to the direction of the Board of Directors (R. 193); subsidiary corporations have been changed into divisions and vice versa (R. 193); each division maintains a separate bank account, a separate table of organization, and separate accounts for payroll and accounting purposes (R. 149, 195); and CBS itself admitted that other than corporate form there are no differences between CBS divisions and subsidiary corporations (Salant, R. 195).

23. The separate identity and joint purpose of CBS-TV and CBS are effectively demonstrated by the roles each played in consummating the Milwaukee transaction. CBS caused CBS-TV—with whom Poller had made the affiliation agreement (R. 57)—to cancel it (R. 20, 223); the acquisition of Poller's equipment was then made by CBS (R. 61).

ject to the antitrust laws regardless of whether the lawyers who watchfully preside over them determine that they be corporate or unincorporated. *United States v. Yellow Cab Co.*, 332 U. S. 218, 227 (1947). Especially is this true here, where respondents took the precaution to establish a separate corporation known as "Columbia Television, Inc." so that the name would be protected, but left it as an empty shell and developed the unincorporated division to carry on the substance of the television business (R. 143-44).

In opposition to this view, respondents rely on the dictum of Mr. Justice Jackson's dissenting opinion in *Timken Roller Bearing Co. v. United States*, 341 U. S. 593, 606 (1951). It is of profound significance that the *Timken* case was decided June 4, 1951, and that the unincorporated "divisional concept" was adopted by CBS immediately thereafter.[24] The inference as to why this was done was made explicit by Salant: it was done "largely for legal reasons" (R. 194).[25]

(2) As to Bartell, owner of the independent station, it was solely on Bartell's *ex parte* affidavit that the court below determined that it knew nothing of the CBS plan. Accordingly, the court concluded that Bartell did nothing more than sell its station. However, regardless of the impropriety of determining Bartell's mental state solely on the basis of its own affidavit, Bartell concededly knew before the option was exercised that CBS was the purchaser. Nevertheless, Bartell proceeded to consummate the deal

24. Dr. Stanton fixed the date of the divisional set-up in June of 1951 (R. 144). Mr. Salant also referred to establishment of the "divisional" concept "in 1951 or shortly thereafter" (R. 194). Memoranda implementing the procedure on appointment and authorization of division executives are dated August 8, 1951 (R. 230-34).

25. At the very least CBS-TV is an unincorporated "association" within the meaning of Section 7 of the Sherman Act, 26 Stat. 209, U. S. C. Title 15, § 7. *United Mine Workers of America v. Coronado Coal Co.*, 259 U. S. 344, 392 (1922) (and cases cited therein); *United States v. Greater New York Live Poultry Chamber of Commerce*, 30 F. 2d 939 (S. D. N. Y. 1928).

with CBS and executed many documents to enable CBS to complete the acquisition; some of them privately with CBS and others for filing with the FCC.[26]

This surely constitutes a "contract, combination or conspiracy" even if Bartell, when it *entered* the scene, had been an innocent seller.[27]

(3) As to Holt, it is clear that his activities constituted an essential element in the respondents' plan and his success was prerequisite to the ultimate consummation of the illegal scheme.

Holt was no mere errand boy or broker, but a man of independent means and position.[28] His testimony reveals that he flew from Birmingham, Alabama, to CBS' office in New York immediately on their summons (R. 119, 122) and from there went at once to Milwaukee to do their bidding (R. 91). Secrecy masked his activity and the stealth bears every earmark of conspiracy. A military style code for names and security was invoked (R. 136-37). He was thoroughly briefed prior to his departure for Milwaukee at a meeting attended by top officials of CBS and CBS-TV (R. 119-20). "Strategy" was discussed (R. 139) and a detailed memorandum was delivered to him as the "field operator" by the head of CBS-TV's engineering department laying out the precise competitive situation in Milwaukee (R. 130, 141-42).

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26. FCC Form 314, Application for Consent to Assignment of Radio Broadcast Station Construction Permit or License, executed October 29, 1954; FCC Form 726, Consent to Voluntary Assignment of Radio Station Construction Permit, executed January 14, 1955; Bill of Sale, Assignment of FCC authorization, and other closing documents dated February 16, 1955 (Answer of Defendants to Interrogatory No. 4, R. 34).

27. *Calcutt v. Gerig*, 271 Fed. 220 (6th Cir. 1921); *Rudner v. United States*, 281 Fed. 516 (6th Cir. 1922); *United States v. Standard Oil Co.*, 152 Fed. 290, 295-96 (E. D. Mo. 1907).

28. Holt testified that he is in business as a management consultant to radio and television stations (R. 113) because of his experience in the operation and organization of such stations. He was formerly a chairman of the Federal Reserve Board (R. 114).

Holt knew that Poller had an affiliation agreement with CBS-TV, but he was indifferent to this (R. 128) even though he knew that it was a thing of value (R. 140) and that CBS would inevitably terminate it upon acquiring Bartell's station (R. 122). He knew from respondents' memorandum that NBC was already affiliated with the one existing VHF station and that NBC would not be interested in acquiring a UHF station. Thus, he knew that the cruel venture on which he was embarking would destroy Poller. He did not communicate with Poller nor did he negotiate for his station.[29] He went at once to see Bartell and, with an ease that is astonishing, quickly obtained an option.

Holt's deposition makes it clear that he was not a mere agent or employee but an independent contractor who owned a contingent remainder in some of the scraps of the conspiracy which would fall his way if the main conspirator decided at any time to alter its plan. Until he assigned the option he acted in the belief that he would be able to consummate the deal for himself if CBS decided not to take it over (R. 138).

Respondents would remove Holt from responsibility by asserting that since there were not appropriate parties who could conspire, there was no conspiracy which Holt could have *aided*. In our view, this argument is without support, because CBS-TV is an entity legally capable of conspiring. Moreover, as we have already indicated, Holt was an independent party and not an agent. He himself was a party to the conspiracy. He had met in CBS' office in New York when the whole plan for the acquisition of Bartell's station was planned. He is not charged with "aiding and abetting" a conspiracy by CBS with others.

29. This evidence raises the important question why Holt did not seek an option from Poller. The inference can be plainly drawn that he had been instructed not to approach Poller because CBS had planned that Poller's new studios and equipment then being built should fall into its hands like ripe fruit once it severed the branch by cancelling the affiliation and announcing that it had an option to acquire the only other station.

Rather, he is charged with *participating* in a conspiracy with CBS.[30]

(4) Finally, corporate officers can be members of a conspiracy with their corporation: see *Schine Chain Theaters v. United States*, 334 U. S. 110, 116 (1948); *United States v. Yellow Cab Co.*, 332 U. S. 218, 227 (1947).[31]

V. CBS' Elimination of Poller and the Exclusive Position It Achieved in Milwaukee Constitute Attempted Monopolization and Monopolization.

CBS always had unchallenged power to eliminate Poller. After it gained control of the UHF market in Milwaukee, CBS had absolute power to exclude other independent UHF operators from that market. The facts make it clear that the other networks, having VHF affiliations, were not interested in UHF. The VHF allocations would not accommodate any additional stations. The only source for expansion in Milwaukee, therefore, was in UHF. Since CBS had complete control over this vast portion of the television spectrum in addition to its great network power, it obviously could manipulate advertising rates and easily foreclose entry by any independents into the UHF market in Milwaukee. Indeed, as a practical matter, what entrepreneur would risk making the heavy investment in a pioneer UHF station when faced with this integrated giant as a competitor? CBS, therefore, now had taken into its

30. The court below erroneously concluded that even if Bartell and Holt "combined with CBS to accomplish a common purpose, it does not seem to us that the purpose was to restrain trade or commerce" (R. 295). In his dissent, Judge Washington makes clear the two-fold error of the majority in this regard: "Whether or not CBS desired that result is a question of fact to be determined at a trial. In a case like the present, however, specific intent to restrain trade or monopolize may be unnecessary. See *United States v. Griffith*, 334 U. S. 100, 105 (1948)" (R. 304).

31. See also *United States v. Bausch & Lomb Optical Co.*, 321 U. S. 707 (1944); *Interstate Circuit v. United States*, 306 U. S. 208 (1939).

complete control the operation and destiny of UHF in Milwaukee, and was in a position to exclude anyone else from the Milwaukee station market.

CBS' elimination of Poller and its power to exclude other competitors in Milwaukee not only is a clear instance of the *existence* of monopoly power, but also is an equally clear manifestation of the *exercise* of that power. *United States v. Griffith*, 334 U. S. 100, 107 (1948).

VI. Summary Judgment May Not Be Granted on a Choice Made From Conflicting Evidence.

A court may not grant summary judgment by making a choice from conflicting evidence. The standards for the application of summary judgment are plain. *Sartor v. Arkansas Natural Gas Corporation*, 321 U. S. 620 (1944). We believe their limits have been so seriously ignored in the present case that this Court in the exercise of its supervisory power should forbid such encroachment on the right of trial by jury.

Especially should summary judgment be kept within its proper confines in the case of an individual plaintiff who seeks redress for injuries done to him by violation of the antitrust law. The difficult burdens which such a plaintiff assumes are proverbial.[32] Corporate defendants, experienced in the application of the antitrust law, are not expected to leave telltale evidence of illegal conduct. A plaintiff who has been injured by them must interpose his own limited resources against their vast powers in an effort to obtain equal justice under the law. Here, where the subjective elements of motive and intent are so important, where the means of proof lie so much in the control of the defendants themselves and where much of the evidence must come from their reluctant testimony, it is especially important that a plaintiff should not be turned away by a credulous accept-

32. See *Loevinger, Private Action—The Strongest Pillar of Antitrust*, 3 Antitrust Bulletin 167 (1958).

ance of self-serving affidavits. No matter how slight the evidence of the plaintiff or how energetic the defendants' denial of wrongdoing may appear, if there is the slightest possibility that the plaintiff can make out a case, he should not be deprived of his right to trial by jury. Trial by lawyer-drawn affidavit [33] is no substitute.

Here the court below repeatedly accepted as true CBS' version of the facts. We mention a few striking instances.

(1) In referring to our contention that each of the three networks has a "vertical" monopoly, the court below states that we argue this "despite the *fact* they are *fiercely* competitive" (Emphasis added) (R. 297).

(2) The court below states that CBS "chose not to attempt to buy Poller's station because it considered the $2,000,000 price too high" (R. 292). This went to the decisive question why CBS, knowing that Poller's station was for sale, did not approach him, but instead bought Bartell's station and then took over Poller's equipment, thereby in the combined act eliminating both Poller and Bartell. CBS explained that its policy was never to buy a station from an affiliate except at the price the affiliate first asked (R. 200-1, 279-80), because otherwise people would be "claiming that we were improperly using our affiliation to grind down . . . an individual's price". It could grind down an individual's price, if it wanted to, according to Salant, its Vice President, "by telling a guy that if he didn't come down in price we'd go across the street and take the affiliation away from him, go across the street and buy" (R. 200). Clearly CBS' explanation alone is sufficient to submit to the jury the issue whether it did not buy or even negotiate for Poller's station because it wanted to grind down his price by going across the street and transferring its affiliation. The majority accepts CBS' argument without even mentioning its own evidence which destroys it.

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33. See Holt Deposition, R. 117.

(3) The majority opinion refers to Poller's statement that he would continue broadcasting in Milwaukee even after he had abandoned his expensive equipment to CBS as proving that CBS made no attempt to monopolize (R. 297). It states this as a fact, without even referring to the inherent circumstances of compulsion, or to the contrary evidence, such as the inadequacy of the Bartell equipment, the fact that his statement appears as a recital in the agreement in which CBS undertook to purchase his equipment, or the obvious fact that he could not survive without an affiliation, now in competition with CBS as a local operator, instead of Bartell.

(4) The majority declares: "His [Poller's] sale to CBS was not sought by the latter. On the contrary, CBS bought Poller's equipment only at his importunity . . . ." (R. 294). This is a recognition of the shadow instead of the substance of the event. Poller importuned CBS to take his equipment off his hands only after CBS, already having in its pocket an option to buy Bartell, telegraphed Poller that his affiliation was cancelled. His conduct was what CBS had every right to anticipate and, indeed, to rely on,—he flew at once to New York and begged for mercy. To equate Poller's supplication with an independent offer to sell, is to attribute the result of a conspiracy to the conscious plan of the victim rather than the conspirators. Indeed, CBS itself has not gone so far as the majority below. For Salant expressly declared that CBS agreed to buy Poller's equipment because he felt sorry for Poller after he complained that he had been left "stranded high and dry" by CBS.[34]

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34. Salant's testimony: "He [Poller] felt that we had let him down very badly. His argument was that he had spent a lot of money on equipment, studios, on building up his station as an affiliate of the CBS Television Network; that now we had gone elsewhere to buy a station and cancelled his affiliation. He was left stranded high and dry with something far beyond what he could possibly need. He felt that we had dealt with him very badly.

"Ambie is going to kill me for this. I felt sorry for him. I felt that while we had not acted improperly, no matter what the reasons

The majority opinion is completely silent on the function of a court in summary judgment cases. One reads the opinion as if it were the conclusion of a trial by a judge without a jury. It is only in Judge Washington's dissenting opinion that some of the contrary facts are set out and recognition is given to the test which should apply in reviewing the evidence on such a motion. And as Judge Washington said, the general rule "would seem particularly true where (as here) it is charged that the public has been deprived of maximum television service by a reduction of competition . . . ." (R. 305).

CONCLUSION.

It is therefore respectfully submitted that the summary judgment entered by the District Court and affirmed by the Court of Appeals should be reversed and the District Court should be ordered to proceed to trial on the merits.

Respectfully submitted,

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were, here was a guy that poured his heart and his soul and his money —and his wife, I remember, whom I had met working at the station, too, and she was an awfully nice lady . . . . It was not the sort of thing you enjoy nor appreciate" (R. 223-24).

APPENDIX A.

STATUTES INVOLVED.

Sherman Act.

"1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

"2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . .

"7. The word 'person', or 'persons', wherever used in Sections 1-7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

Clayton Act.

"4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 45

LOU POLLER,

Petitioner,

v.

COLUMBIA BROADCASTING SYSTEM, INC., CBS TELEVISION, J. L. VAN VOLKENBURG, and H. K. AKERBERG,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

LOU POLLER, *Petitioner,* v. COLUMBIA BROADCASTING SYSTEM, INC., CBS TELEVISION, J. L. VAN VOLKENBURG, and H. K. AKERBERG, *Respondents.*	No. 45

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RESPONDENTS

Questions Presented

1. Whether the owner of a television station in a multi-station market was injured in his business or property by reason of any violation of the Sherman Act when the network which had been supplying programs to his station under an affiliation agreement terminated that agreement, in accordance with its terms, because it acquired its own station in that market.

2. Whether summary judgment dismissing petitioner's complaint was properly granted.

Statement

Petitioner is the assignee of Midwest Broadcasting Company ("Midwest"), a dissolved Wisconsin corporation of which he was president. Respondent Columbia Broadcasting System, Inc. ("CBS"), among other things, owns television stations and operates one of three national television networks. CBS Television is an unincorporated division through which CBS conducts its television operations; it was named as a defendant but did not appear because it is not a legal entity capable of being sued. Respondent J. L. Van Volkenburg was an officer, and respondent H. K. Akerberg an employee, of CBS.

Initially, all television broadcasting stations in the United States operated on Channels 2 to 13, the very-high frequency ("VHF") wave lengths (R 13). In June 1952, after a long freeze on the issuance of licenses for new stations (R 205, 235-6), the Federal Communications Commission ("FCC") opened additional channels (14 to 82) in the ultra-high frequency ("UHF") wave lengths (R 13). At that time, few, if any, receivers in the hands of the public were equipped to receive UHF signals (R 13), and the new UHF stations faced great difficulty in competing with VHF stations in the same markets (R 14, 155). Three of the new UHF channels were allocated to Milwaukee (R 14).

Midwest applied for a license to operate on one of the UHF channels, and was granted a construction permit in February 1953 (R 15, 235). Its station, WCAN-TV, began broadcasting in September 1953 (R 15). Shortly thereafter, another UHF station, that of Bartell Broadcasters, Inc. ("Bartell"), WOKY, also went on the air (R 16). At that time, there was one other station in the market, WTMJ, a "pre-freeze" VHF station which had a primary NBC affiliation (R 14). Competing applications

were then pending for a second VHF station (R 16), and in January 1954 the Commission added a third VHF channel to a Milwaukee suburb (R 16).

After starting construction of his station, petitioner approached all three networks (R 93) for an affiliation agreement under which that station would obtain national network programs for broadcast in Milwaukee. In August 1953, when Midwest was about to commence operation of the station, it entered into an affiliation agreement with CBS (R 57-60). That agreement contained a clause, modifying the general form, which permitted CBS to terminate it at any time on six months' notice (R 59). That clause was intended to indicate to the affiliate that the relationship was a trial (R 159, 161, 183), and it was so understood by petitioner (R 95, 99).

Petitioner testified (R 94) that he asked CBS "continuously" to eliminate the six-month termination clause and "never stopped asking"; and that he "bombarded" the CBS representatives with material. He stated that "It wasn't so much the letter of the law as the acknowledgement that you were there to remain as an affiliate" (R 95), that he never got that acknowledgement (R 95), and that he used the CBS insignia with "trepidation" (R 99).

Under the FCC's multiple ownership rule in effect in 1953,* a single licensee was not permitted to own more than five television broadcasting stations. In December 1953, the FCC issued a notice of proposed rule-making looking toward the amendment of its rule to permit single ownership of seven stations, of which no more than five could be VHF stations (R 50). CBS had long championed UHF television (R 205). It filed a statement with the Commission supporting the proposed amendment (R 50, 252-7).

*Regulations, § 3.636(a).

Anticipating the adoption of that proposed rule, CBS undertook in July 1954 to put itself in a position to acquire a UHF station in Milwaukee (R 50). CBS had heard from a number of different sources that petitioner had been trying to sell his station at a price in excess of $2,000,000 (R 152, 163, 179). CBS considered that to be substantially more than the property was worth (R 152, 163) and "completely out of line" (R 184). CBS' president thought that this was more than just puffing because of inquiries which he had received from financial people who came to see him about getting a regular two-year affiliation agreement in the event of a sale of the station (R 163-5). He testified: "I was even offered a piece of the station under the table if I would cause it to have a 2-year contract by a man that Mr. Poller had gone to" (R 165, 179).

In this situation, CBS chose not to undertake negotiations with petitioner (R 184). CBS thought that it could buy the other UHF station in Milwaukee, WOKY, owned by Bartell, at a reasonable price (R 32, 152). It arranged to have defendant Holt go to Milwaukee to negotiate for an assignable option to purchase that station (R 91). Holt obtained such an option without disclosing that he was acting for CBS (R 50, 92). The price was $335,000, which was $50,000 more than Bartell had invested in the station (R 131-2).

The amendment to the FCC rule permitting the ownership by a single person of two UHF, in addition to five VHF, stations became effective October 22, 1954. At that time, Holt assigned his option to CBS and it was exercised (R 89, 92). Bartell had no knowledge prior to the assignment that CBS was the prospective purchaser (R 90, 92).

On October 21, 1954, CBS gave Midwest a six-month notice of the termination of its affiliation agreement (R 50). The following day, petitioner went to New York and met with representatives of CBS. He complained of the termi-

nation and stated that he had gone to great expense for a new studio and equipment which was far more elaborate than that which would be required for the operation of a station which did not have a CBS affiliation (R 50, 198). After further conversations and negotiations, an agreement was reached (R 61-84) under which CBS acquired the studio and equipment of Midwest, paid that company $500,000, and transferred to it the equipment which CBS had acquired from Bartell. The agreement contained a recital that Midwest intended to continue the operation of its station (R 61). Petitioner acknowledged that CBS assumed liability for the work in progress and that he was reimbursed in full for the sums which he had spent on the studio (R 105).

Both the Bartell option and the agreement between CBS and Midwest were conditioned on approval by the FCC of the assignment of the Bartell license to CBS. Such approval was granted on January 14, 1955. At the same time, the FCC granted an application by Midwest for modification of its permit to allow the removal of its main studio to the location previously used by Bartell (R 51-2). 11 Pike & Fischer RR 913.

CBS commenced operation of the Milwaukee station under changed call letters WXIX-TV on February 17, 1955. At that time, there were two VHF stations in the market (R 241-2). One of them was WTMJ, the primary NBC affiliate (R 160, 238), which was "a giant" (R 155). The second had commenced operation in October 1954 with a primary ABC affiliation (R 17). Later, a third VHF station went on the air in Milwaukee, and CBS operated the only UHF station in the country that was in competition with three VHF stations in the same market (R 209). It continued such operation until March 31, 1959 (R 272), when it finally succumbed to the VHF competition.

At the time it contracted for the Milwaukee station, CBS owned three television stations out of a total of 386

that were then on the air (R 52). It had affiliation agreements giving it option time on 127 stations, less than one-third of the total number on the air (R 52). During the year 1954, CBS' share of the aggregate time sales to national and regional advertisers represented 23.3% of the industry total of such sales (R 86).

Television advertising is of three types: network, national spot and local. Network advertising is placed by national advertisers with network organizations; national spot advertising is placed by such advertisers directly with individual stations (R 85). Of the 50 largest CBS television network customers in 1955, 78% also used national spot advertising and 50% were included in the 100 largest national spot advertisers (R 54). During the same year, of the 50 largest CBS television network customers, 76% also advertised on at least one other television network, and 58% were among the 50 largest customers of at least one other television network (R 54).

Petitioner's own statements reflect the inherent difficulties which confronted all UHF stations faced with VHF competition. His complaint (R 13-14) refers to the fact that initially all television broadcasting was in the VHF band; and that when, in June 1952, the FCC authorized the use of UHF channels, "the success of UHF stations was extremely problematical". Petitioner's opposing affidavit (R 247-8) refers to the fact that the number of UHF stations in the country decreased from 121 in December 1953 to 84 in November 1958.

The complaint also alleges (R 14) that "at no time material to this action could a UHF television station remain in existence at Milwaukee without the advantage of an affiliation with CBS, NBC or ABC".

This action was commenced in September 1956, eighteen months after the transaction between CBS and petitioner's

company was concluded. The complaint (R 6-23) charges that petitioner was driven out of the broadcasting business in Milwaukee by a conspiracy to restrain trade in violation of Section 1, and by monopolization and attempted monopolization in violation of Section 2, of the Sherman Act.

Respondents' motion for summary judgment (R 46) was made after depositions had been taken and interrogatories answered. Thereafter, petitioner took further depositions for use in opposition to the motion.

The District Court granted respondents' motion for summary judgment (R 282-6). The Court of Appeals affirmed, with one judge dissenting (R 290-307).

Summary of Argument

1. Petitioner entered into an affiliation agreement which was terminable by CBS on six months' notice. He did so with full knowledge that its continuance was uncertain. Yet the sole injury for which he seeks redress is the alleged loss of the value of his business as a going concern, which, on his own statement, depended on the continuance of that affiliation. The only issue in the case is whether the cancellation of the affiliation agreement, in accordance with its terms, by reason of CBS' purchase of a competing station violated the antitrust laws.

Petitioner seeks to confuse that single issue by discussion of conditions in the television industry which have no relevance here. CBS did not exert any "leverage" of its alleged network power in dealing with petitioner. In the Milwaukee market, where petitioner's business was conducted, CBS was far from dominant. And its only activity that caused the claimed injury to petitioner was that of a program supplier seeking to present its own programs under highly competitive conditions.

The fact that, after cancelling the affiliation, CBS bought petitioner's equipment adds nothing to his case.

Petitioner claims that trade was restrained in television broadcasting, not in equipment sales. On his own premise, the injury of which he complains was suffered as soon as the affiliation was cancelled; the subsequent property purchase, far from contributing to the injury, relieved him of liabilities and reimbursed him for what he had spent on his new studio.

Termination of the affiliation, the Court below properly held, was a legitimate exercise by CBS of its right, under *United States* v. *Colgate & Co.*, 250 U. S. 300, to discontinue furnishing its programs to petitioner.

2. The *Colgate* rule is not rendered inapplicable by the fact that CBS bought a station in the market and did not merely change affiliates,—a course which would concededly have been legal. The challenged transaction entailed no violation of the Sherman Act. It did not restrain trade or create monopoly.

Petitioner's claim is that the purchase by CBS of the Bartell station and of petitioner's equipment restrained trade by reducing from two to one the number of UHF stations in Milwaukee. That claim is irreconcilable with his allegation that an unaffiliated UHF station could not survive in Milwaukee or elsewhere. Bartell had no network affiliation, and on petitioner's assertion, could not have survived. Thus there would, in any event, have been only one UHF station in the market. This was not due to any action on the part of CBS.

The charges of monopolization and attempt to monopolize rest on the fallacious premise that "UHF in Milwaukee" is a separate market. This ignores the intense competition between UHF and VHF stations, to the decided disadvantage of the former. CBS eventually succumbed to that competition. It is the only alleged monopolist

to come before this Court after it had been driven out of business by the superior power of its competitors.

3. The fallacy in petitioner's claim that CBS used "leverage" power against him is shown by the authorities on which he relies. This case is wholly unlike *United States* v. *Radio Corporation of America,* 358 U. S. 334, where the complaint charged that NBC compelled Westinghouse to exchange its Philadelphia station for the NBC station in Cleveland by threatening to withhold NBC affiliation from Westinghouse not only in Philadelphia, but also in other cities. In later proceedings under the consent judgment in that case, the Department of Justice determined that the termination of the Westinghouse affiliation in Boston because of NBC's purchase of another station in that market—a situation identical with the present one—would not violate the statute.

The other cases cited by petitioner, unlike this case, all entailed a tie-in arrangement or a use of monopoly power to force a desired course of dealing. There was here no monopoly and no tie-in, but only the unilateral exercise of CBS' rights as a program supplier in a competitive market.

4. There is no merit in petitioner's effort to avoid the *Colgate* rule on the ground that the ownership of stations by a network is a *per se* violation of the Sherman Act. That claim is refuted by the very authorities on which petitioner relies. The affirmative showing that there was no restraint of trade and no monopolization in Milwaukee requires the dimissal of his complaint. In asserting that network ownership of stations imposes restraints on other program suppliers and advertisers, petitioner seeks to raise issues which are not germane to this private action.

The question of legislative policy which petitioner raises is one for the Congress or the Commission, and not for this Court. It is a question which has long been before the FCC.

That agency has repeatedly sanctioned network ownership of stations as a matter of policy. The Court below properly held that much weight should be given to its expert judgment that such ownership does not violate the statute.

5. Petitioner's claim under Section 1 must be rejected on the further ground that, as a matter of law, the essential element of a conspiracy was lacking. CBS Television is the unincorporated division of the corporation through which all of its television operations are conducted. It is not a legal entity and not capable of being a conspirator. Neither Bartell nor Holt joined with CBS in such concerted action for a common purpose as is required to make them parties to a conspiracy. The naming of two CBS employees does not create a conspiracy charge since there were no other conspirators.

6. There is no triable issue of fact warranting the denial of summary judgment. Petitioner's efforts to create such issues rest on the erroneous legal premises which permeate his entire case. The fact of competition among the networks cannot be disputed on this record. Petitioner's efforts to impute questionable motives to CBS' representatives rest on surmise and suspicion and not on evidence. Even if they raised genuine issues of fact, those issues would not be determinative under either Section 1 or Section 2 of the Sherman Act.

I.

PETITIONER'S CLAIM OF INJURY RESTS SOLELY ON THE TERMINATION OF HIS NETWORK AFFILIATION, WHICH THE COURTS BELOW PROPERLY HELD TO BE PERMISSIBLE UNDER THE RULE OF *UNITED STATES* v. *COLGATE & CO.*, 250 U. S. 300.

Petitioner may maintain this private action only if he was "injured in his business or property by reason of any-

thing forbidden in the antitrust laws." At the outset, it is necessary to identify his claim of injury and the act by which it was caused. When this is done, it becomes apparent that petitioner's alleged injury was caused solely by a unilateral termination of dealings which did not violate the antitrust laws.

Petitioner engaged in broadcasting in Milwaukee. By its affiliation agreement with him, CBS agreed to supply to him its programs for broadcast in that city. Those programs competed with the programs of the other two networks, as well as those from other sources. Far from being dominant in Milwaukee, CBS was at a decided competitive disadvantage in that market. The programs of NBC were broadcast by the first station in the market, WTMJ, which was a VHF station and a "giant" (R 155).

Under the FCC's Chain Broadcasting Regulations (§ 3.658(c)), no affiliation agreement may continue for a period of more than two years. When it decided to supply its programs for broadcast over the technically inferior UHF outlet, CBS entered into an arrangement with petitioner which was a "trial" (R159), and was so understood by him. He testified (R 99) that he used the CBS insignia with "trepidation"; that in seeking to have the six-month termination clause eliminated from his contract, "It wasn't so much the letter of the law as the acknowledgement that you were there to remain as an affiliate" (R 95); and that he never did get that acknowledgement (R 95). Yet it is indisputable on this record that the injury for which he seeks redress was caused by the loss of that affiliation, and by nothing else.

Petitioner admitted (R 105) that, under the contract for the sale of his equipment (R 61-84), CBS reimbursed him for his expenditures on his new studio building and assumed liability for the work in progress on that build-

ing. His damage claim is predicated on the alleged difference between the sum of $500,000 which he received under that contract (plus $50,000 which is alleged to have been the value of the Bartell equipment that he received) and the "fair value" of his station, which he claims to have been $2,000,000 (R 22-3). That valuation is based on an offer allegedly received from George Storer (R 17, 97). Petitioner admitted, however, that Storer's interest was conditioned on the assumption that the station would have a CBS affiliation (R 97-100).* And his brief (p. 8) refers to the purchase of petitioner's equipment for a price "far less than" he "could have obtained for his going, successful station", *i.e.*, the station which had a CBS affiliation.

Petitioner's brief does not take issue with the statement in the opinion below that (R 294):

> "Poller admits that the large value he placed on the Midwest station—greatly in excess of its cost—depended upon a CBS affiliation not subject to cancellation on six months' notice."

It is plain that the claim of injury to "business or property" in this case is a claim for the loss of something which petitioner did not have. The act of CBS which caused that claimed loss was the act of terminating the affiliation agreement, and the only issue in the case is whether that termination was legal.

Petitioner seeks to obscure this single issue by a discussion of numerous aspects of the broadcasting industry which are wholly unrelated to his claim of injury. His brief (p. 13) purports to recognize that the "must buy" and

*This is confirmed in petitioner's brief. While the complaint alleges (R 19) that CBS persuaded Storer to discontinue negotiations with petitioner's station, the brief (p. 4) shows that allegation to amount only to the charge that CBS refused to give Storer "assurance that the CBS affiliation would be continued".

"option time" practices, which are claimed to be illegal, "do not, of course, by their mere existence confer a cause of action on petitioner". It describes those practices as means to "the acquisition of additional power beyond that which is inherent in the nature of the network itself". Unless such "additional power" was exerted against petitioner, those practices are wholly unrelated to his claim of injury and have no bearing on this private action.*

It is plain that such alleged power was not exerted in any way in the transaction by which petitioner claims to have been injured.** CBS conducted no negotiations with petitioner before cancelling the affiliation. Indeed, one of his grievances, as the Court below noted (R 295), is that CBS dealt with Bartell instead of negotiating with him for the purchase of his station. In terminating the affiliation agreement, CBS simply exercised its right as a program supplier to discontinue the use of petitioner's station as an outlet for its programs; it exerted no pressure derived from any other facet of its operations.

In choosing to purchase the Bartell station, CBS certainly did not use the alleged network "leverage". On the contrary, far from applying any pressure, it successfully concealed its identity as the purchaser. The very fact that a "dummy" was used disproves petitioner's assertion (p. 24) that CBS used its "leverage power as a network to enter into the business of operating a local TV station".

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*_Fifth & Walnut, Inc._ v. _Loew's, Incorporated_, 176 F. 2d 587, 590 (2d Cir.), cert den. 338 U. S. 894; _Conference of Studio Unions_ v. _Loew's Inc._, 193 F. 2d 51, cert. den. 342 U. S. 919; _Wolfe_ v. _National Lead Co._, 225 F. 2d 427 (9th Cir.), cert. den. 350 U. S. 915; _Hunter Douglas Corporation_ v. _Lando Products_, 235 F. 2d 631, 638 (9th Cir.); _Miller Motors, Inc._ v. _Ford Motor Co._, 252 F. 2d 441, 448 (4th Cir.); _Affiliated Music Enterprises_ v. _Sesac, Inc._, 268 F. 2d 13, 16 (2d Cir.), cert. den. 361 U. S. 831.

**For this reason, there is no occasion to answer petitioner's contention that "must buy" and "option time" violated the statute. We do not concede the illegality of either of those practices; they present issues which obviously cannot be decided on this record.

Petitioner asserts, however, that "leverage" was used "to grind down his price". That assertion is both erroneous and irrelevant. CBS did not buy petitioner's station, but his equipment. That purchase, it is conceded (R 21, 105), relieved him of substantial obligations and reimbursed him in full for what he had spent on his studio. His complaint is not that he received too little for the equipment which was sold, but that he did not receive what he claims to have been the "fair value" of the station as a going concern.

Petitioner's brief (p. 37) admits that he "importuned CBS to take the equipment off his hands". That importuning occurred after CBS had committed itself to the purchase of the Bartell station and had given petitioner notice of termination. The brief (p. 26) declares that:

> "The economic fact is that CBS eliminated Poller the moment it bought Bartell. . . ".

The equipment purchase, it is plain, contributed in no way to the fact that petitioner could not continue in business. In exchange, he received the equipment with which Bartell had been operating. The purchase of the Bartell station, which is claimed to have "eliminated" petitioner, was what necessarily led to the cancellation of his affiliation. The injury allegedly caused by that cancellation, and not any grievance he might have in connection with the equipment purchase, is the sole basis for his claim to treble damages under the Sherman Act. Cf. *Bookout* v. *Schine Chain Theatres,* 253 F. 2d 292 (2d Cir.); *Peter* v. *Western Newspaper Union,* 200 F. 2d 867, 872 (5th Cir.); *Peterson* v. *Borden Co.,* 50 F. 2d 644 (7th Cir.).

In short, petitioner cannot escape from the fact that, on his own premise, it was the refusal of CBS to continue supplying him with its programs, and that alone, which caused the alleged injury on which this action is based.

Unless the termination of his affiliation agreement because CBS was entering the local market was unlawful, petitioner was not injured in his business or property "by reason of anything forbidden in the antitrust laws."

In recognizing that this was the business situation, the Court below adopted no new antitrust doctrine. There is no basis for petitioner's assertions (p. 23) that the Court thought that a violation of the statute was excused by "a kind of contributory negligence" or "a kind of doctrine of estoppel by contract". The opinion noted the indisputable fact that petitioner's "real complaint is that CBS would not eliminate the six months' cancellation clause from his affiliation agreement" (R 296). It held that the cancellation of the agreement in accordance with that clause, on which petitioner's claim of injury is based, constituted the unilateral exercise of CBS' right to select the outlet for its own programs in the Milwaukee market. *United States* v. *Colgate & Co.*, 250 U. S. 300.

The *Colgate* rule has been applied, as the Court below noted (R 296), to the termination of network affiliation agreements. *Federal Broadcasting System, Inc.* v. *American Broadcasting Co.*, 167 F. 2d 349 (2d Cir.), cert. den. 335 U. S. 821. Numerous decisions of the Courts of Appeals have applied it to claims clearly analogous to the present one arising out of the termination of exclusive dealership arrangements.* And this Court recently reaffirmed the applicability of the *Colgate* decision to "a case of a single

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Packard Motor Car Co. v. *Webster Motor Car Co.*, 243 F. 2d 418 (D. C. Cir.), cert. den. 355 U. S. 822; *Schwing Motor Co.* v. *Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md.), aff'd on opinion below, 239 F. 2d 176 (4th Cir.), cert. den. 355 U. S. 823; *Hudson Sales Corp.* v. *Waldrip*, 211 F. 2d 268 (5th Cir.), cert den. 348 U. S. 821; *Fargo Glass & Paint Co.* v. *Globe American Corp.*, 201 F. 2d 534 (7th Cir.), cert. den. 345 U. S. 942; *Nelson Radio & Supply Co.* v. *Motorola, Inc.*, 200 F. 2d 911 (5th Cir.), cert. den. 345 U. S. 925.

trader refusing to deal with another". *Klor's* v. *Broadway-Hale Stores*, 359 U. S. 207, 212. This is such a case.

Both Courts below recognized (R 284, 296), of course, that the *Colgate* rule is not absolute. However, there is no occasion to consider here the cases, culminating in *United States* v. *Parke, Davis & Co.*, 362 U. S. 29, referred to by petitioner (p. 23), which involved efforts to control resale prices. See *Associated Beverages Co.* v. *Ballantine & Sons*, 287 F. 2d 261, 265 (5th Cir.) The only limitation here pertinent is that which was stated by this Court, with the citation of numerous authorities, in *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 625:

> ". . . Refusals to sell, without more, do not violate the law. Though group boycotts, or concerted refusals to deal, clearly run afoul of § 1, . . . different criteria have long applied to qualify the rights of an individual seller. Beginning with *United States* v. *Colgate & Co.*, 250 U. S. 300 (1919), this Court's decisions have recognized individual refusals to sell as a general right, though 'neither absolute nor exempt from regulation.' *Lorain Journal* v. *United States*, 342 U. S. 143, 155 (1951). If accompanied by unlawful conduct or agreement, or conceived in monopolistic purpose or market control, even individual sellers' refusals to deal have transgressed the Act. . . ."

We turn now to a showing (Point II) that the termination of dealings which alone caused petitioner's injury was not rendered unlawful by the fact that it was occasioned by CBS' acquisition of its own station, since there was no restraint of trade and no monopolization. We shall then consider petitioner's efforts to avoid the *Colgate* rule by mistaken reliance on cases dealing with the use of "leverage" power (Point III), and by advocating a rule of *per se* illegality that is contrary to this Court's decisions on vertical integration (Point IV).

II.

THE TERMINATION OF PETITIONER'S AFFILIATION TO ENABLE CBS TO CARRY ITS OWN PROGRAMS OVER THE STATION WHICH IT ACQUIRED DID NOT RESTRAIN TRADE IN VIOLATION OF SECTION 1 AND WAS NOT MONOPOLIZATION OR AN ATTEMPT TO MONOPOLIZE IN VIOLATION OF SECTION 2.

In considering petitioner's claim, it is necessary to distinguish, as petitioner does not, between the two sections of the statute which he has invoked.

A. THERE WAS NO RESTRAINT OF TRADE IN VIOLATION OF SECTION 1.

The charge that a restraint of competition was effected because the number of stations in Milwaukee was reduced is refuted by petitioner's own allegations. His complaint alleges (R 13) that:

> "There was and is no place in the United States where an unaffiliated UHF station could or can operate and survive in competition with stations owned by or having affiliation with a national network."

Specifically with reference to Milwaukee, it alleges (R 14) that ". . . at no time material to this action could a UHF television station remain in existence at Milwaukee without the advantage of an affiliation with CBS, NBC or ABC". His attempt to fasten responsibility on CBS for the reduction from two to one in the number of UHF stations in Milwaukee cannot be reconciled with those allegations.

While plaintiff operated his station, he had a CBS affiliation, and the other two networks were affiliated with the technically superior VHF stations in the market. On his own allegations, had the situation remained unchanged, Bartell, who had no affiliation, could not have continued to operate. This was recognized by the dissenting Judge below (R 303-4). No restraint under Section 1 can be estab-

lished by the claimed elimination of a station which, on petitioner's basic premise, could not have survived.*

> "If competition is doomed by market conditions, it cannot be 'lessened' by a change of ownership." *Union Leader Corp.* v. *Newspapers of New England, Inc.*, 284 F. 2d 582, 589 (1st Cir.) cert. den. 365 U. S. 833.

Petitioner acknowledged that he was concerned that the life span of his station could be extremely short because CBS might move its affiliation from him to a VHF station (R 107). He conceded (R 108) that such a change of affiliation would have been legal; and this is recognized in his brief (pp. 24, 25). Such a change of affiliation from petitioner to another station would have left him in a much worse position than did the challenged transaction, since there would have been no occasion for CBS to relieve him of his recently incurred investment in the station. Moreover, on petitioner's premise that an unaffiliated UHF station could not operate in Milwaukee, a change of affiliation to the other UHF station would have left that station the only UHF station in the market; and if CBS had affiliated with a VHF station, neither of the UHF stations could have survived.

Accordingly, the number of stations in the market was no more reduced by the cancellation of petitioner's affiliation because of CBS' acquisition of a station than would have been the case if there had been merely a change of affiliation. From the standpoint of the antitrust laws, the difference between the two transactions is without significance.

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*Even under the stricter limitation on acquisitions imposed by Section 7 of the Clayton Act, the acquisition of a business which "faced the grave probability of a business failure" is not prohibited. *International Shoe Co.* v. *Federal Trade Commission*, 280 U. S. 291, 302. See also *United States* v. *Maryland & Virginia Milk Producers Association, Inc.*, 167 F. Supp. 799, 808 (D. C.). Petitioner testified that he knew that Bartell "had an unsuccessful operation" (R 108).

Cf. *Fargo Glass & Paint Co.* v. *Globe American Corp.*, 201 F. 2d 534 (7th Cir.), cert. den. 345 U. S. 942; *Interborough News Co.* v. *Curtis Publishing Co.*, 225 F. 2d 289 (2d Cir.).

In the latter case, it was held that the Sherman Act was not violated by a magazine publisher which discontinued the distribution of its magazines by the plaintiff, set up competing wholesalers which it subsidized, and actively persuaded competing publishers to take their business away from plaintiff and give it to the new subsidized wholesalers. The Court wrote (225 F. 2d at 293):

> "The nub of the matter is that the peculiar features of schemes for price fixing and elimination of competition which appear in such leading cases as Interstate Circuit v. United States, 1939, 306 U. S. 208, United States v. Masonite Corp., 1942, 316 U. S. 265 and United States v. United States Gypsum Co., 1948, 333 U. S. 364, are wholly absent here. Curtis had a legal right to break away from a wholesaler whose service it considered unsatisfactory and to set up and encourage by subsidy new competing wholesalers; and there is no reason apparent to us why Curtis should not use every reasonable effort to influence and persuade other national distributors to patronize the new competing wholesalers."

The Report of the Attorney General's Committee To Study The Antitrust Laws (p. 28) pointed to the similarity between the exclusive dealership cases and those dealing with vertical integration, such as *United States* v. *Columbia Steel Co.*, 334 U. S. 495. The Committee noted that the Section 1 test of reasonableness applies whether exclusive dealings are "achieved by ownership or otherwise". Petitioner cites no authority to show that there is any antitrust distinction between the two situations, and there is none.

The claim that competition was restrained is not strengthened by the fact that CBS purchased petitioner's

equipment. It has been pointed out above (Point I) that the purchase followed the contract termination, which is the sole basis for petitioner's claimed injury. Further, under the same contract by which CBS purchased his equipment, it sold to petitioner the Bartell equipment. Petitioner does not assert that the physical operation of the station, under the license which he retained, could not have been undertaken with the Bartell equipment. On his own premise, it was the cancellation of the affiliation, and not the equipment purchase, which made it impossible for him to survive in the Milwaukee market.

Finally, petitioner charges CBS with exerting a restraining effect "on the future development of the UHF spectrum" (p. 26). In effect, he seeks to make CBS responsible for the lack of success of UHF stations throughout the country. The claim overlooks CBS' four-year effort to make its UHF station a success. It could have substance only on the fantastic assumption—for which there is not a shred of evidence—that CBS acquired the station in order to make it fail. Petitioner's own contentions, as well as the well known history of the industry reflected in his affidavit (R 247-8), affirmatively establish that the decline in the number of UHF stations "was due to the competition in the market place, in the midst of which even giants may fall". *Interborough News Co.* v. *Curtis Publishing Co.*, 225 F. 2d 289, 291 (2d Cir.).

B. THERE WAS NO MONOPOLIZATION OR ATTEMPTED MONOPOLIZATION IN VIOLATION OF SECTION 2.

Under Section 2, the threshold inquiry is to determine the relevant market in which the alleged monopoly has been obtained or sought. *United States* v. *E. I. duPont de Nemours & Co.*, 351 U. S. 377, 394; *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F. 2d 418, 420 (D. C. Cir.), cert den. 355 U. S. 822; *Report of the Attorney*

General's Committee to Study the Antitrust Laws, p. 44. At the oral argument in the District Court, petitioner's counsel defined the relevant market as "UHF in Milwaukee" (R 275). That is the market which his present brief repeatedly asserts (pp. 18, 26, 34-5) that CBS monopolized.

Petitioner's market definition destroys his case under Section 2 at the very outset. "UHF in Milwaukee" could be considered a market by itself under that section only if there were no competition between UHF stations and VHF stations in the same city. *United States* v. *E. I. duPont de Nemours & Co., supra; Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320. That they do compete with each other is indisputable. Indeed, the intensity of the competition between the two types of stations, to the decided disadvantage of UHF, is repeatedly referred to in petitioner's complaint (R 13, 14, 19). It is a matter which has been judicially noticed on several occasions by the Court below. See *Greylock Broadcasting Co.* v. *United States*, 231 F. 2d 748, 749 (D. C. Cir.); *WIRL Company* v. *United States*, 253 F. 2d 863, 865 (D. C. Cir.), judgment vacated on other grounds 358 U. S. 51; *Owensboro On The Air* v. *United States*, 266 F. 2d 702, 704 (D. C. Cir.).

Acceptance of petitioner's market definition would lead to the absurd conclusion that any UHF station in any area is a monopolist if its only competition in that area comes from a VHF station.

Lacking evidence of monopolization in any relevant market, petitioner would have this Court disregard the presence in Milwaukee of the other networks and the other stations on the ground that (p. 34) "the other networks, having VHF affiliations, were not interested in UHF", which was the only source for expansion. In effect, CBS is accused of monopolization because it was the only network which was willing to have its programs presented in Milwaukee over a technically handicapped UHF channel.

CBS can no more be charged with responsibility for the failure of applicants to seek the available UHF channels in Milwaukee than can NBC, ABC or the set manufacturers who produced receivers that can receive only VHF signals. If CBS was a monopolist, it is the only monopolist ever to appear before this Court after it had been driven out of business by the competition of those with superior facilities.

Petitioner was obviously driven to the concept of "UHF in Milwaukee" as the relevant market because there is no other area of its business in which it can be claimed that CBS had a monopoly. Both as a national network and as a station operator in Milwaukee, CBS was faced with intense competition. In Milwaukee, CBS competed with two, and later three, stations which had decided physical advantages. After four years of effort, it succumbed to that competition. As a national network, it had, on petitioner's own statement (Brief, p. 11), about one-third of the market for national television advertising. This patently does not establish monopoly. Cf. *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 424; *United States* v. *Columbia Steel Co.,* 334 U. S. 495, 527-8.

The offense of monopolization can be established only by showing that the defendant has acquired the power to exclude competitors from the market and consequently to fix prices. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 226; *American Tobacco Co.* v. *United States,* 328 U. S. 781, 811; *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 432 (2d Cir.). The claim that CBS was in a position at any time to exclude competitors from any conceivably relevant market is fully disproved on the record. The only power which it had was the power to select the outlet for its programs. Both before and after CBS acquired its station, those programs were presented in Milwaukee under intensely competitive conditions.

The documents annexed to petitioner's opposing affidavit (R 258, 260), as well as the uncontradicted statements of CBS' officers (R 54, 191), show that in determining the price to be charged for its facilities—a price which was half that of its principal competitor, WTMJ (R 141, 260)*—CBS was necessarily guided by competitive conditions in the market. At no time did CBS have any of the identifying characteristics of a monopolist.

The charge of attempted monopolization is likewise without basis in the record. First, it falls with petitioner's fallacious definition of the relevant market. In view of the genuine competition between stations of the two types, CBS could have attempted to monopolize the station market only on the absurd assumption that its UHF operation might drive off the air the superior VHF stations. Secondly, there is not a shred of evidence that CBS sought the Milwaukee station for any but its professed purposes of assisting in the promotion of UHF service and of making a profit (R 31-2, 162-3).

To establish the offense of attempted monopolization, there must be proof of "specific intent to accomplish the unlawful result of monopolization". *Swift & Co.* v. *United States,* 196 U. S. 375, 396; *United States* v. *Griffith,* 334 U. S. 100, 105; *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 432. No such intention can conceivably be shown in this case. Attainment of the power to exclude others, which is the distinguishing feature of monopoly, is in this regulated industry a legal, as well as a practical, impossibility. The fact of regulation establishes not only the impossibility of monopolization and hence the futility of the attempt, but also that there cannot be that "dangerous

*The CBS Rate Committee suggested the rate of $700 an hour for its new station (R 260). This was the same rate that petitioner had just made effective (R 258). The rate on station WTMJ was $1400 per hour (R 141).

probability" of the result which is an essential ingredient of the offense of attempting to monopolize. *Swift & Co.* v. *United States,* 196 U. S. 375, 396.

III.

THE AUTHORITIES ON WHICH PETITIONER RELIES SHOW THE FALLACY IN HIS CONTENTION THAT CBS USED "LEVERAGE POWER" IN MILWAUKEE.

The basic error in petitioner's position—and in that of the dissenting Judge below (R 305-6)—is shown most strikingly by their reliance on *United States* v. *Radio Corporation of America,* 358 U. S. 334. Petitioner states (p. 25) that that case presented "the same situation as ours". Not only are the two situations wholly different; the position taken by the Department of Justice in later proceedings in that case specifically affirmed the legality of a transaction identical with that here involved.

The complaint in the *RCA* case alleged that NBC, which already owned five VHF stations, sought to acquire stations in five of the eight largest markets in the country. This could be done only if it gave up one or more of its stations in smaller markets. The complaint alleged that in order to force Westinghouse to exchange its station in Philadelphia, the fourth largest market, for NBC's Cleveland station, NBC threatened Westinghouse with loss of its network affiliations in Philadelphia and Boston and with the denial of an NBC affiliation in Pittsburgh and in any other market where Westinghouse might acquire a station.

It was the tie-in between different markets, and consequent use of "leverage" wholly absent here, that constituted the gravamen of the Government's complaint against RCA and NBC. This is shown by the terms of the final judgment which was entered on consent after remand by this Court, and by the subsequent proceedings under that judgment. The text of the judgment is published in 18 Pike & Fischer

RR 2153. It was before this Court in *Westinghouse Broadcasting Co.* v. *United States*, 364 U. S. 518.

The judgment enjoins the defendants from coercing or attempting to coerce any person to transfer a broadcast station to either defendant "by terminating or threatening to terminate or refusing or threatening to refuse to enter into, an NBC network affiliation agreement with any *other* television broadcast station controlled by the same person . . ." (emphasis added). It explicitly recognizes the right of the defendants to acquire stations in any of the eight largest markets by means which do not constitute an unreasonable restraint of trade; and except with respect to an asserted use of non-affiliation in other markets, it places on the Government the burden of proof on the issue whether a proposed acquisition was obtained by acts constituting an unreasonable restraint of trade.*

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*The pertinent portion of the judgment reads as follows:

"NBC, and RCA during any period of time when it directly or indirectly controls or has a substantial ownership interest in a television network, are each enjoined and restrained from:

(A) Coercing or attempting to coerce any person to sell or otherwise transfer any ownership interest in any broadcast station to either defendant, or to any person directly or indirectly controlled by either defendant or in which either defendant directly or indirectly has a substantial ownership interest, by terminating or threatening to terminate or refusing or threatening to refuse to enter into, an NBC network affiliation agreement with any other television broadcast station controlled by the same person or in which such person has a substantial ownership interest;

(B) Acquiring directly or indirectly any substantial ownership interest in any television broadcast station in the market area of New York, Chicago, Los Angeles, Detroit, Boston, San Francisco, or Pittsburgh, unless

(1) defendants shall have given written notice of the proposed acquisition to plaintiff, affording plaintiff opportunity to apply to this Court within thirty days after such notice for a determination by the Court as provided in clause (2) hereof, and

Pursuant to the consent judgment, NBC and RCA gave notice of their proposal to acquire television stations in Boston and San Francisco. After full investigation, the Department of Justice decided not to apply to the Court for a determination as to whether the acquisitions were permissible. Westinghouse moved to intervene, claiming that the judgment would be violated by NBC's proposed acquisition of a station in Boston, which would result in the loss of Westinghouse's NBC affiliation there. Its motion was denied, *Westinghouse Broadcasting Co.* v. *United States,* 186 F. Supp. 776 (E. D. Pa.), and its appeal to this Court was dismissed (364 U. S. 518).

The record in this Court (October Term 1960, No. 484) contains the text of a report by the Department of Justice to the Chairman of the House Committee on the Judiciary, describing the investigation of the proposed acquisitions which had led to the conclusion that they did not violate the *RCA* judgment. That report, dated May 26, 1960, states that "the initial conspiracy depended for its illegality upon the unlawful means, not found here, which were used by NBC to gain advantage in one market by use of the affiliation power with respect to another". The following paragraph of the report is directly pertinent to this case:

> "True, the loss of NBC affiliation by Westinghouse and KRON [*] may result in economic injury to their broadcasting operations in Boston and San Francisco. Such injury, however, is attributable to

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(2) if plaintiff shall have so applied, the Court shall have determined that the consent of the other party to the proposed acquisition was not obtained by acts or conduct of NBC or RCA relating in any way to the negotiations for the proposed acquisition, which acts or conduct constitute either (a) an unreasonable restraint of trade (as to which issue plaintiff shall have the burden of proof) or (b) a violation of subsection (A) of this Section IV (as to which issue the defendants shall have the burden of proof);".

*KRON was the NBC affiliate in San Francisco which faced the loss of affiliation if NBC acquired a station in that market.

> exercise by NBC of its option to terminate the affiliation relationship rather than to acts or conduct of RCA or NBC improper under the decree."

Since acts "improper under the decree" included acts constituting "an unreasonable restraint of trade", the Department's report is a plain declaration that "the exercise by NBC of its option to terminate the affiliation relationship" by reason of its acquisition of another station in the market did not constitute such a restraint. That is the "same situation as ours"; it is quite different from the situation described in the complaint which was before this Court in *United States* v. *Radio Corporation of America, supra.*

The other authorities cited by petitioner likewise show the fallacy in his effort to find an illegal tie-in here. In *Lorain Journal Co.* v. *United States,* 342 U. S. 143, it was held that the publisher of the only newspapers in a city could not refuse to accept advertising from businesses which patronized a radio station in that city. There, as in *Schine Chain Theatres* v. *United States,* 334 U. S. 110, and *United States* v. *Griffith,* 334 U. S. 100, there was an actual monopoly in one area that was used to put pressure in another area on those who dealt or sought to deal with the monopolist. Here, CBS was one of three competing networks; it was not a monopolist in any sense. And no "leverage" use was made of its programs in order to drive a bargain in another area.

In *Eastman Kodak Co.* v. *Southern Photo Materials Co.,* 273 U. S. 359, the decree in a prior action by the Government established that the defendant had a monopoly. It was held that defendant's refusal to sell to plaintiff was motivated by the desire to perpetuate its conceded monopoly.

In *United States* v. *General Motors Corp.,* 121 F. 2d 376 (7th Cir.), the violation of Section 1 consisted of a tie-in

arrangement by which the defendant required purchasers of its automobiles to buy from it another distinct service, automobile financing. Here, but a single service is involved. CBS is seeking to reach the public with its own programs, and it decided to do so itself rather than through an affiliate. It did not use its position as a program supplier to coerce any activity or secure any advantage whatever in the competitive Milwaukee market. The inapplicability of the *General Motors Corp.* case to situations like the present one has been recognized in opinions upholding changes in exclusive automobile dealerships. *Schwing Motor Co.* v. *Hudson Sales Corp.*, 138 F. Supp. 899, 906 (D. Md.), aff'd 239 F. 2d 176 (4th Cir.), cert. den. 355 U. S. 823; *Nelligan* v. *Ford Motor Co.*, 262 F. 2d 556, 558 (4th Cir.).

In each of the cases on which petitioner relies, there was either an actual monopoly or a tie-in arrangement. Here, CBS had no monopoly and there was no tie-in. Petitioner seeks to apply those cases to the present situation by claiming that CBS used "its leverage power as a network to enter into the business of operating a local TV station" (p. 24). What petitioner means by CBS' "leverage power as a network" is the power to withhold its programs, and the use of that power can mean nothing other than the threat to terminate its affiliation (Brief, pp. 7, 12, 14).

On this record, it cannot be controverted that CBS did not in any way use a threat to disaffiliate in order to enter the local market. It entered the local market by two acts,—the purchase of Bartell's station and the termination of petitioner's affiliation. We have pointed out above (Point I) that neither of those acts involved any threat to disaffiliate or other use of leverage. CBS had no affiliation with Bartell, and it used a dummy to negotiate with him. It terminated its affiliation with petitioner by simple notice, with no threat of any kind.

Moreover, the only act which could conceivably have been brought about by the exercise of any pressure, express or implied, was the sale by petitioner of his equipment, which occurred after the contract termination. That sale did not contribute in any way to the alleged market restraint on which petitioner's case is based.

There is, and obviously can be, no contention that petitioner's equipment was unique, or that CBS required it in order to enter the Milwaukee market. The equipment transaction was an exchange; it did not disable petitioner from broadcasting. He claims that he could not continue in business, not because of any inadequacy in the Bartell equipment which he acquired, but because he was no longer to have the CBS programs. CBS' acquisition of petitioner's equipment was not a step either in CBS' entry into the market or in petitioner's leaving it.

CBS is charged with restraining trade in television broadcasting, not in equipment. There is neither allegation nor evidence that the market for equipment was affected in any way by the challenged transaction. And petitioner was not in the business of selling equipment. He claims to have been injured in his business as a broadcaster. His claim of injury, as has been shown, is not that an inadequate price was paid for his equipment *qua* equipment, but that he lost the value of his station as a going business. That value petitioner attributes to the CBS affiliation. The very authorities on which he relies show that his claimed injury did not result in any sense from the exercise by CBS of "leverage" power.

IV

PETITIONER'S ARGUMENT THAT THE OWNERSHIP OF A STATION BY A NETWORK IS A *PER SE* VIOLATION OF SECTION 1 GOES BEYOND THE ISSUE IN THIS CASE AND IS ERRONEOUS AS A MATTER OF LAW

Petitioner asserts (p. 27) that CBS's acquisition of a Milwaukee station—"wholly apart from its illegal use against Poller of the leverage of its network power"—constitutes an unreasonable restraint of trade. In effect, he asks this Court to disregard the affirmative showing that there was here no restraint and to adopt a rule making network ownership of local stations a *per se* violation of the Sherman Act.

In advocating that rule, petitioner wanders far from his own claim of injury. He describes alleged effects of the challenged practice on other networks and on program suppliers and advertisers as though he were in the position of the Attorney General or the FCC. Those alleged restraints on competition are wholly unrelated to the injury which he claims to have suffered.

> ". . . in order to state a cause of action under the anti-trust laws a plaintiff must show more than that one purpose of the conspiracy was a restraint of trade and that an act has been committed which harms him. He must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. Otherwise he is not injured 'by reason' of anything forbidden in the anti-trust laws.
>
> ". . . Recovery and damages under the anti-trust law is available to those who have been directly injured by the lessening of competition and withheld from those who seek the windfall of treble damages because of incidental harm." *Conference of Studio Unions* v. *Loew's Inc.*, 193 F. 2d 51, 55 (2d Cir.), cert. den. 342 U. S. 919.

The only area of the economy in which petitioner conducted his business was that of local broadcasting in Milwaukee. His discussion of possible restraints elsewhere has no bearing on this case since "the right of action given to persons injured through the resultant tendency to substantial lessening of competition or creation of monopoly" includes "such injury only as such tendency to lessen competition or to create monopoly engendered". *Peterson* v. *Borden Co.*, 50 F. 2d 644, 646 (7th Cir.).* In Milwaukee, it has been shown that, on petitioner's own allegations, there was no restraint and no monopolization.

Furthermore, the restraint by which he claims to have been affected—the alleged reduction in the number of stations in the market—did not result from the fact that one of those stations came under the ownership of a network. Petitioner's brief (p. 27) states that "realistically the removal of CBS affiliation was the same as the removal of all affiliation possibilities, since the other two networks were already affiliated with preferred VHF stations". This is an acknowledgment that the alleged restraining effect of ownership does not differ from that caused by affiliation. It shows that whether or not one of the stations in Milwaukee was owned by a network had no effect whatever on the number of stations that could remain in business there.

The rule for which petitioner contends, moreover, must be rejected on the basis of the very authorities which he cites. In *United States* v. *Paramount Pictures*, 334 U. S. 131, 173-4, this Court explicitly rejected the Government's contention that "vertical integration of producing, distributing and exhibiting motion pictures is illegal *per se*". And in *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 525, it stated:

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*See also *Bookout* v. *Schine Chain Theatres*, 253 F. 2d 292 (2d Cir.); *Affiliated Music Enterprises* v. *Sesac, Inc.*, 268 F. 2d 13, 16 (2d Cir.), cert. den. 361 U. S. 831.

> "It seems clear to us that vertical integration, as such without more, cannot be held violative of the Sherman Act."

Petitioner's case on this point is obviously much weaker than was that of the Government in *Paramount*. There, it had been found that the major distributors had engaged in a horizontal conspiracy which warranted treating each of them as a monopolist for certain purposes. Here, there is no suggestion of any collusive action among the three networks.

In place of the requirement stated in *Paramount* and *Columbia Steel* that vertical integration may be held invalid only by a showing that it unreasonably restrains competition, petitioner presents an argument of legislative policy that might appropriately be addressed to the Congress or the FCC. It has no place in an argument before this Court. As stated in the *Columbia Steel Co.* case (at 526):

> "If businesses are to be forbidden from entering into different stages of production that order must come from Congress, not the courts."

In this connection, it may be noted that concern over the disparity in bargaining power between automobile manufacturers and their dealers led to the enactment of a specific statute "to supplement the antitrust laws". 15 U. S. C. § 1221, *et seq.* In *Miller Motors, Inc.* v. *Ford Motor Co.*, 149 F. Supp. 790, 810-11 (N. D. N. C.), aff'd 252 F. 2d 441 (4th Cir.), it was claimed that the market control exercised by the manufacturer violated the Sherman Act. The Court referred to the new statute and its legislative history and stated that "Congress evidently did not share this view". See also *Nelligan* v. *Ford Motor Co.*, 262 F. 2d 556, 559 (4th Cir.).

The legislative issue to which petitioner's argument is addressed is one which has long been before the Commis-

sion. It has repeatedly been decided in favor of network ownership. Petitioner refers (p. 15) to the 1941 Report on Chain Broadcasting, in which the Commission stated that as an initial matter it might have reached the conclusion "that the businesses of station operation and network operation should be entirely separate". The regulations adopted on the basis of that report, however, expressly permitted network ownership, subject to the condition that competition not be substantially restrained thereby. See *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 207-8. That condition was carried over into the television regulations under which the present acquisition was approved by the Commission.*

Furthermore, whatever its past misgivings, the Commission has repeatedly rejected the position for which petitioner contends. *ABC-Paramount Merger Case,* 8 Pike & Fischer RR 540, 629-30; *St. Louis Telecast, Inc.,* 12 Pike & Fischer RR 1289, 1372; *New Britain Broadcasting Co.,* 14 Pike & Fischer RR 725; *National Broadcasting Company, Inc.,* 20 Pike & Fischer RR 411, 419. In *St. Louis Telecast, Inc., supra,* the Commission stated:

> ". . . We have recognized that network broadcasting is an essential of the American pattern of broadcasting, and that the ownership of broadcast stations in major markets by the networks is an important element of network broadcasting. . . ."

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*Section 3.658(f) of the Federal Communications Commission's Rules and Regulations reads:

> "Network ownership of station. No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control of a network organization, for a television broadcast station in any locality where the existing television broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing."

The same position was stated in the Report and Order by which the Commission adopted the "5 and 2" amendment to the multiple ownership rule. 11 Pike & Fischer RR 1519, 1523.

In direct conflict with the considered position of the Commission, petitioner argues for a rule of *per se* illegality which would brand network ownership of stations as one of those "practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal". *Northern Pacific Railway Co.* v. *United States*, 356 U. S. 1, 5. The Court below (R 299) properly rejected this contention with the statement that much weight should be given to "the expert Commission's regulation . . . that such limited multiple ownership of facilities in the field it regulates" does not violate the statute. Petitioner asks this Court to adopt a contrary rule, and to do so retroactively in a private action brought by one whose claim of injury has been shown to result solely from a contract termination free of any restraint in or monopolization of the only market in which his business was conducted. His claim is both irrelevant to his alleged private injury and wholly lacking in merit.

V.

THE CLAIM UNDER SECTION 1 IS UNTENABLE FOR THE FURTHER REASON THAT PETITIONER'S ALLEGED INJURY RESULTED FROM THE UNILATERAL ACTION OF CBS. AS A MATTER OF LAW, THE ESSENTIAL ELEMENT OF A CONSPIRACY IS LACKING.

Petitioner charges that the conspirators with CBS were CBS Television, a division of the company, and two of its employees, as well as Bartell and Holt. To find a conspiracy among the company itself, one of its unincorporated divisions and the two employees who participated in its action is to read the conspiracy requirement out of the statute.

The conclusion that Bartell and Holt, or either of them, entered into a conspiracy with CBS to bring about the alleged restraint would be contrary to the controlling authorities.

A. CBS Television is not a legal entity. It is an internal division of the company through which all of its television activities were conducted (R 48, 144). It is not a "subsidiary", and the corporation is not its "parent" (R 195). Petitioner asserts (p. 30) that it was created to operate "in an independent area of activity—television broadcasting—which for operational purposes may be deemed a separate industry." That area of economic activity is the only one in which any of CBS' acts bearing on this case took place. It may even be assumed, *arguendo*, that there might be a conspiracy between different divisions of the same company which were engaged in different areas of economic activity. That assumption does not aid petitioner's case. His charge is against CBS, a single corporation, and all of that corporation's television activities were pursued through a single division, CBS Television. It is thus wholly immaterial that the company had five other unincorporated divisions operating in different areas (R 48). On petitioner's premise, every unilateral action of a corporation which had two divisions would constitute a conspiracy between the corporation and the division which performed the act.

Petitioner purports to find sinister significance in the fact that the divisional organization of CBS was adopted shortly after this Court's decision in *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593. Assuming that the date is more than coincidence, it is difficult to see how CBS can be criticized for adopting a form of organization that would reduce its legal risks. In any event, the statement on the subject in the *Timken* case is not impaired by the fact that it was a *dictum* in the dissenting opinion of Mr. Justice Jackson. That opinion referred to a concession by the Government that if the principal defendant, instead of forming

subsidiary corporations, had set up separate departments in its business, there would have been no conspiracy. That position is reiterated in the Report of the Attorney General's Committee to Study the Antitrust Laws (p. 35). There is no contrary authority.

Even if different divisions of the corporation were here involved, petitioner's position would lead to absurd results. It would mean that employees working in two different divisions of a corporation could not discuss cooperation without violating the antitrust laws. No large corporation which is organized into separate divisions could coordinate its activities. The absurdity is accentuated in a situation like the present one in which, as stated above, all the activities were those of a single division of the corporation.*

B. Nor is the conspiracy claim aided by naming as conspirators two of the employees who acted on behalf of the corporation. The authorities cited by petitioner (p. 34) to the effect that corporate officers can be members of a conspiracy with their corporation were all cases in which there were other conspirators. In *Schine Chain Theatres* v. *United States*, 334 U. S. 110; *United States* v. *Yellow Cab. Co.*, 332 U. S. 218; and *Interstate Circuit* v. *United States*, 306 U. S. 208, several corporations, as well as individuals, were found to be conspirators. *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, involved a conspiracy on the part of a corporation and its officers and "at least some" of its numerous wholesalers. Here, CBS is charged with conspiring with itself. Cf. *Nelson Radio*

*Petitioner's contention (p. 31, footnote 25) that "at the very least" a division is "an unincorporated association" is untenable. This is shown by his reliance on *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U. S. 344, where it was held that "merely as a procedural matter" (at 390), a union was suable in its own name. No such problem is presented here. CBS, a corporation, is answerable for the acts of its employees in all its divisions. If a part of a corporation were an association, who would be its members?

& Supply Co. v. *Motorola, Inc.*, 200 F. 2d 911, 914 (5th Cir.), cert. den. 345 U. S. 925.

C. Petitioner mistakenly asserts (p. 31) that the determination that Bartell knew nothing of the CBS plan was based solely on Bartell's *ex parte* affidavit. Petitioner had the opportunity to take Bartell's deposition, but did not do so.* Moreover, Bartell's affidavit is corroborated by Holt, both in his affidavit (R 92) and in the deposition which petitioner did take. Holt testified that he did not want anyone to know that he was in Milwaukee for CBS (R 130), that he did not tell Bartell on whose behalf he was dealing (R 138), and that when he telephoned Bartell to tell him that the option had been assigned to CBS, Bartell was "so flabbergasted" that he called Holt back a few minutes later to make sure that he had heard him right (R 133-4). And petitioner's brief (p. 4) states that Holt secured an option from Bartell "without disclosing CBS' interest in the transaction".

Petitioner further contends that Bartell knew when the deal was consummated that the sale was to CBS, and accordingly became a conspirator when CBS entered the scene. There is not a shred of evidence, however, that Bartell knew of or shared in any allegedly illegal purpose. Without such evidence, it cannot be held to have been a conspirator. "The proof must show that the illegal purpose was mutual." *Carter-Crume Co.* v. *Peurrung*, 86 Fed. 439, 442 (6th Cir.).**

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*Cf. *Orvis* v. *Brickman*, 196 F. 2d 762, 765-6 (D. C. Cir.); *Wise* v. *Universal Corporation*, 93 F. Supp. 393, 398 (D. Del.).

**The cases cited by petitioner (p. 32, footnote 27) are clearly inapposite. *Calcutt* v. *Gerig*, 271 Fed. 220 (6th Cir.) involved participation in mob violence for a purpose known to all the defendants. *United States* v. *Standard Oil Co.*, 152 Fed. 290 (E. D. Mo.) and *Rudner* v. *United States*, 281 Fed. 516 (6th Cir.) both contained express findings that the defendants, when their participation commenced, knew that there was a conspiracy.

D. With respect to Holt, the record also shows that, as a matter of law, he may not be held to have been a conspirator. Holt went to Milwaukee at the request of CBS (R. 121, 135). He "had been given the particular job of getting an option on WOKY" (R 123, 127-128). His only interest was in carrying out that assignment (R 124). No issue is raised by petitioner's assertion (p. 33) that Holt "owned a contingent remainder in some of the scraps of the conspiracy which would fall his way if the main conspirator decided at any time to alter its plan". At most this is a charge that Holt might have an interest in the abandonment of the conspiracy. At the very point in the record cited by petitioner, Holt testified that he was always willing to assign the option to CBS at any time they asked for it (R 138). No purpose on his part to accomplish any restraint can be founded on his statement that it was taken for granted that, the option being in his name, if CBS did not exercise it "I probably would have the right to do what I wanted to do" (R 138). As he stated at an earlier point (R 135), "The option was assignable but in my name, and I naturally was going to give CBS the assignment as far as I was concerned." Once the option was exercised, Holt had no further interest in the matter.

No significance can be attached to petitioner's effort to dramatize Holt's mission as one in which care was taken to assure secrecy. Brokers in the fields of real estate and finance regularly engage in similar transactions, with equal insistence upon secrecy. Whether Holt was technically an employee or an independent contractor is also immaterial.

Petitioner does not even contend that Holt knew of any purpose on the part of CBS to restrain or monopolize trade. All that is claimed (p. 33) is that he knew that Poller had an affiliation agreement which would be terminated, and that this "would destroy Poller". Such destruction could have been effected, however, by many wholly lawful business

transactions or even by acts which, though wrongful in some other sense, do not violate the Sherman Act. Cf. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127; *Mackey* v. *Sears, Roebuck & Co.*, 237 F. 2d 869 (7th Cir.); *Bender* v. *Hearst Corporation*, 263 F. 2d 360 (2d Cir.). Accordingly, petitioner's claim does not charge the offense of conspiracy to violate the Act.

"Those having no knowledge of the conspiracy are not conspirators." *United States* v. *Falcone*, 311 U. S. 205, 210, aff'g 109 F. 2d 579 (2d Cir.). The type of participation required to make one a conspirator was described by Judge Learned Hand in the *Falcone* case as follows:

> "It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome." (109 F. 2d at 581)

See also *United States* v. *Gerke*, 125 F. 2d 243, 246 (6th Cir.), cert. den. 316 U. S. 667.

Petitioner attempts (p. 33) to avoid the *Falcone* rule by asserting that Holt is not charged with aiding a preexisting conspiracy, but with being himself a party to the conspiracy. The contention is apparently cast in this form because it is plain that without Holt's participation there was no conspiracy which he could have aided. This claim does not aid petitioner's case. On the contrary, it is clear that greater participation, and a greater "stake in the outcome", must be shown to establish the formation of a conspiracy than are required to sustain a charge of aiding an existing conspiracy. In *Di Bonaventura* v. *United States*, 15 F. 2d 494 (4th Cir.), a conviction was reversed because the Court had charged that a landlord could be convicted of conspiracy on a finding that he knew that liquor was being manu-

factured in his premises and did not stop it. The Court wrote (at 496):

> "* * * This might have justified a conviction of maintaining a nuisance or of unlawful manufacture, but not a conviction of the felony of conspiracy, in the absence of any finding that the landlord entered into a combination or agreement to violate the law, or that he, with knowledge that a conspiracy existed, not merely that the law was being violated, aided the conspirators in carrying out their unlawful design."

On petitioner's own statement (R 109), there was no purpose on the part of either Bartell or Holt to promote or cooperate in any restraint of trade or monopolization on the part of CBS. Treating the testimony in the light most favorable to petitioner, and assuming a purpose on the part of CBS of which there is no evidence, there was at most a unilateral act by CBS, not a conspiracy, coupled with innocent acts by Bartell and Holt which helped to advance the CBS purpose. For this reason alone, it must be held as a matter of law that there was no violation of Section 1 of the Sherman Act.

VI.

THERE IS NO ISSUE AS TO A MATERIAL FACT JUSTIFYING THE DENIAL OF SUMMARY JUDGMENT.

The erroneous legal premises that permeate petitioner's argument are reflected in his contention that there are triable questions of fact. The asserted "subjective elements of motive and intent" (Brief, p. 35), which petitioner would submit to a jury, do not relate to any determinative issue. The material facts are admitted by petitioner, and the conclusions drawn by the Court below necessarily follow from those admitted facts. The decision

is in accord with a substantial body of authority disposing of similar claims as matters of law.*

Petitioner purports (pp. 36-8) to state "four instances" of the alleged acceptance by the Court below of CBS' version of the facts. Not one of them presents a triable issue of a material fact.

(1) Petitioner cites, without further comment, the Court's reference to the fact that the three networks are "fiercely competitive". His lack of comment is significant. At no point does petitioner challenge the fact that there is complete competition among the networks. He cites no evidence in the record to controvert that fact, and there is none. The existence of fully competitive conditions was affirmatively shown in the moving papers (R 52-5, 85-7). Petitioner took lengthy depositions for use on the motion, but made no effort to seek any facts to dispute that showing.

(2) Petitioner quotes the Court's statement (R 292) that "CBS chose not to buy Poller's station because it considered the $2,000,000 price too high". This is said to relate to the "decisive question" as to why CBS did not buy petitioner's station instead of that of Bartell. On what issue that question is "decisive", the brief does not state. Certainly, nothing in the Sherman Act gave petitioner a "right of first refusal" to sell his station to CBS. There is no conceivable antitrust theory on which a jury could be asked to pass upon the veracity of the testimony that CBS did not negotiate for the purchase of petitioner's station

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*Schwing Motor Co. v. Hudson Sales Corp., 138 F. Supp. 899, aff'd 239 F. 2d 176 (4th Cir.), cert. den. 355 U. S. 823; Interborough News Co. v. Curtis Publishing Co., 225 F. 2d 289 (2d Cir.); Nelson Radio & Supply Co. v. Motorola, Inc., 200 F. 2d 911 (5th Cir.), cert. den. 345 U. S. 925; Boro Hall Corp. v. General Motors Corp., 124 F. 2d 822, rehearing denied 130 F. 2d 196 (2d Cir.), cert. den. 317 U. S. 695.

because it had learned that he had placed an excessive price on it.

The negotiation with petitioner in which CBS was unwilling to engage was for his business as a going concern. The value which petitioner attributed to that business was concededly a value created by CBS' own programs. Petitioner's complaint that CBS did not buy from him is a complaint that it refused to pay for the right to present its own programs in Milwaukee. Indeed, the full answer to petitioner's contention that CBS exercised the "leverage" of its position as a program supplier is found in the fact that it refrained from bargaining with him for the purchase of his station. Whatever the motive, the simple refusal to deal cannot be distorted into evidence of an antitrust violation.

Petitioner suggests, however, that a jury should be allowed to pass upon the question whether CBS did not plan in advance to "grind down his price". Petitioner offers only surmise and suspicion to overcome the positive statements of CBS' officers that no property purchase was contemplated when the affiliation was terminated (R 51, 157, 185).* Even if the issue were material, such conjecture would be insufficient to defeat summary judgment. Cf. *Thomas* v. *Mutual Benefit Health & Accident Assn.*, 220 F. 2d 17 (2d Cir.); *Banco di Espana* v. *Federal Reserve Bank*, 28 F. Supp. 958, 973 (S. D. N. Y.), aff'd 114 F. 2d 438 (2d Cir.); *Carlander* v. *Dubuque Fire & Marine Ins. Co.*, 87 F. Supp. 65, 69 (D. Ark.); 6 Moore's Federal Practice (2d Ed.) 2131.

The question which petitioner seeks to raise, moreover, is not a material one. The purchase by CBS of petitioner's equipment, it has been shown, followed the acts by which CBS entered the Milwaukee market. Far from contributing

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*CBS' president, Stanton, testified (R 157):

"I was the most surprised man in the world when I was told that he was offering his facilities to us."

to the injury on which this action is based, it was sought by petitioner and was of benefit to him. The sinister purpose which petitioner claims that a jury should be allowed to infer was not a purpose to accomplish the restraint of trade with which CBS is charged.

(3) Petitioner criticizes the Court's statement (R 297) regarding petitioner's representation that he would continue broadcasting in Milwaukee, but does not show how it creates any material issue. The brief fails to mention the fact that, under the very agreement which contained that representation, petitioner acquired the Bartell equipment. With that equipment and the license which he retained, petitioner was certainly as capable of staying in business as was Bartell.

If, as petitioner contends, he "could not survive without an affiliation", it necessarily follows that Bartell could not have survived. Thus the Court's statement which he challenges is plainly immaterial to the antitrust issue. Petitioner's own allegations compel the conclusion that CBS was not responsible for a reduction of the number of stations in the market.

(4) Petitioner quotes the Court's statement to the effect that the equipment purchase was not sought by CBS. He does not, however, challenge the accuracy of that statement. Indeed, he admits (p. 37) that he "importuned CBS to take his equipment off his hands", and that this occurred after the affiliation was cancelled. These statements confirm the showing made above that no "leverage" was exercised and that the equipment purchase is irrelevant to the claim on which this action is based. Further, petitioner fails to point out the materiality of the testimony that CBS agreed to buy his equipment because its officer felt sorry for him. Surely,

no antitrust claim can be based on the fact that its action proceeded from such a sentiment.

THE JUDGMENT SHOULD BE AFFIRMED.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 45.—October Term, 1961.

Lou Poller, Petitioner, v. Columbia Broadcasting System, Inc., et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[February 19, 1962.]

Mr. Justice Clark delivered the opinion of the Court.

The question involved here is whether this treble damage action based on alleged violations of the restraint of trade and monopoly sections of the Sherman Law [1] was rightly terminated by a summary judgment of dismissal. The petitioner, Lou Poller, is the assignee of the Midwest Broadcasting Company, a dissolved corporation. In 1954 Midwest was the owner and operator of WCAN, an ultra high frequency (UHF) [2] broadcasting station located in Milwaukee. The station was affiliated with

[1] Section 1 of the Sherman Act provides that: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . . ." 26 Stat. 209, as amended, 15 U. S. C. § 1.

Section 2 of the Sherman Act provides that: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with another person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ." 26 Stat. 209, as amended, 15 U. S. C. § 2.

[2] The terms Ultra High Frequency (UHF) and Very High Frequency (VHF) refer to the wave lengths of the electrical impulses which are projected by broadcasting stations to carry programs to receiving sets. Prior to 1952 only the VHF portion of the spectrum was authorised. Generally TV receivers are manufactured only to receive VHF signals and must be modified by an owner to receive UHF.

the Columbia Broadcasting System network and was of the alleged value of $2,000,000. Poller charged that the respondents in 1954 entered into an unlawful conspiracy to eliminate WCAN from the broadcast field in Milwaukee.[2] It was a part of the conspiracy that respondent Holt was to secure in his name an option to purchase WOKY, a competing but inferior UHF broadcaster in Milwaukee. When and if the Federal Communications Commission amended its multiple ownership rules, then under consideration, so as to permit CBS to own UHF stations in addition to its VHF ones, Holt was to assign his option to CBS if it so elected. In that event, it was agreed CBS would cancel its affiliation agreement with WCAN pursuant to its option in that contract and in due course consummate its purchase of WOKY. This would place WCAN in the precarious position of competing with the two major national networks with stations in Milwaukee. Being unable to survive such competition, its only course would be to liquidate at distressed prices its valuable equipment and facilities only recently acquired. CBS might then acquire them at its own price for use in its new operation which was necessary because of the inferior quality of those of WOKY. CBS would then have Midwest's superior facilities and equipment which with the WOKY license would enable it to start broadcasting at a minimum expense and the least possible delay. Poller further claimed that the overall purpose of CBS was to destroy UHF broadcasting, which had only been permitted to enter the field in 1952, in order to protect its vast interest in VHF stations throughout the United States. Finally, he alleged the conspiracy was so successful that CBS not only acquired WCAN at a loss of

[2] The conspirators were alleged to be Columbia Broadcasting System, Inc.; CBS-TV; J. L. Van Volkenburg, President of CBS-TV; H. K. Akerberg, Vice President of CBS-TV; Bartell Broadcasters, Inc., owners of WOKY; and Thad Holt, a management consultant.

$1,450,000 to Midwest but that the latter was obliged to buy the facilities and equipment of WOKY at exhorbitant prices and to agree to continue broadcasting from the latter's premises—which was done "in order to pretend that there was no restraint of trade or elimination of competition . . . ." However, WCAN continued in business only 10 days after CBS started its broadcasts on February 17, 1955. CBS discontinued UHF broadcasting in 1959 when it became affiliated with a Milwaukee VHF station.

At the hearing on the motion for summary judgment the trial judge held that the injury suffered was *damnum absque injuria*, stating that CBS had a right to purchase WOKY, subject to Federal Communications Commission approval, and to cancel its affiliation contract with WCAN. 174 F. Supp. 802. The Court of Appeals affirmed with Judge Washington dissenting, 284 F. 2d 599, and we granted certiorari, 365 U. S. 840. We now conclude that there was a genuine issue as to material facts and that summary judgment was not therefore in order.

I.

Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case "show that [except as to the amount of damages] there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56 (c), Fed. Rules Civ. Proc. This rule authorizes summary judgment "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, . . . [and where] no genuine issue remains for trial . . . [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620, 627 (1944). We now examine the contention of the parties to determine whether under the rule summary judgment was proper.

II.

The respondents in their motion for summary judgment depended upon the affidavits of four persons. The first is Richard Salant, Vice President of CBS; another, Jay Eliasberg, Director of its Research Division; a third, Lee Bartell, who made the sale of WOKY to CBS at a $50,000 profit; and finally, Thad Holt, a codefendant who received $10,000 from the transaction. These were supplemented by material taken from petitioner's depositions of Salant and CBS President Stanton. It is readily apparent that each of these persons was an interested party.

Respondents appear to place most reliance on the Salant testimony, and we shall, therefore, take it up in some detail. It projects three defences, the first being that there was no conspiracy for the following reasons: CBS–TV was not a separate entity but only a division of CBS, and therefore there could be no conspiracy between the two; Holt, the cover man in securing the option and purchase of WOKY, "had been given the particular job" by CBS and therefore was not a conspirator; and Bartell never shared in any illegal purpose that would bring him into the conspiracy. Secondly, in any event, the only issue in the case is the legality of the cancellation of the affiliation agreement by CBS which was merely the legal exercise by CBS of "the normal right of a producer to select the outlet for its product." And, finally, the monopoly charges are entirely "frivolous." The trial judge accepted the second defense.

III.

It may be that CBS by independent action could have exercised its granted right to cancel WCAN's affiliation upon six months' notice and independently purchased its own outlet in Milwaukee. However, if such a cancellation and purchase were part and parcel of unlaw-

ful conduct or agreement with others or were conceived in a purpose to unreasonably restrain trade, control a market, or monopolize, then such conduct might well run afoul of the Sherman Law. See *Times-Picayune Pub. Co.* v. *United States*, 345 U. S. 594, 624–625 (1953); *Eastman Kodak Co.* v. *Southern Materials Co.*, 273 U. S. 359, 375 (1927). Poller alleges and the affidavits, depositions, and exhibits indicate much more than the free exercise by CBS of the granted right of cancellation. A conspiracy is alleged to restrain trade in the Milwaukee television market; to eliminate WCAN from that market; to secure its facilities at depressed prices; and to occupy the UHF band in that market exclusively. The right of cancellation was merely one of the means used to effectuate this conspiracy. Moreover, "in a wider sense" Poller claims that a part of the conspiracy was "to wipe out the most outstanding UHF operator in the country [WCAN] and by wiping him out they destroyed the UHF industry, which was a threat to them, despite their protestations, because of the enormous economic investment they had in VHF."

It is argued that CBS cannot conspire with itself. However, this begs the question for the allegation is that independent parties, *i. e.*, Holt and Bartell, conspired with CBS and its officers.[4] While respondents' affidavits assert that Holt acted in good faith as a special agent or employee for CBS and that Bartell was completely free of any evil motives directed toward WCAN, the trial judge indicated a belief that Holt was "an independent actor" and would have submitted the question of his status to the jury had he not disposed of the case on other grounds. Furthermore, Poller submitted a deposition of Holt, an exhibit to which showed CBS had furnished Holt

[4] We do not pass upon the point urged by Poller that under the CBS corporate arrangement of divisions, with separate officers and autonomy in each, the divisions came within the rule as to corporate subsidiaries.

a complete analysis in writing of the Milwaukee market and the ownership and affiliation of the TV stations there, including WCAN. The deposition revealed that Holt had knowledge that the obvious purpose and necessary effect of the plan would be to eliminate independent UHF in Milwaukee and that he had a personal stake in its success. This included, *inter alia*, Holt's statements that he met with top CBS officials in New York for a briefing on his role, that he was a close friend of these officials, and that he would have retained the option for himself if unused by CBS. The latter admissions, when coupled with the uncertainty at that time of a Federal Communication Commission rule permitting CBS to purchase WCAN, suggest that the alternative plan was to let Holt exercise the option and take the affiliation if CBS could not. Likewise, Bartell's affidavit, barely a page and a half in the record, does not negative the allegations of conspiracy. Unquestionably, after knowing that Holt had in truth been acting for CBS and that the sale would prove disastrous to WCAN, he did file certain papers with the Federal Communications Commission requesting approval of the sale of WOKY. Poller had no opportunity to cross-examine him although he was a key witness to respondent's theory of the case. And it is noted that even though the transfer was uncontested before the Federal Communications Commission it received approval by a vote of only three Commissioners with the remaining two strongly dissenting.[5] It might be that on a trial Poller could substantiate his claims of conspiracy even against Bartell, although this would not be necessary to his case.

Respondents' answer to the charge that one of the purposes of the alleged conspiracy was to exert a restraining effect upon the development of UHF is that this is a

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[5] 11 Pike and Fischer R. R. 913, 914.

"fantastic assumption—for which there is not a shred of evidence." An analysis of the record seems to indicate that in 1954 prior to the purchase of WOKY there were three UHF channels assigned to Milwaukee by the Federal Communications Commission, two of which (WCAN and WOKY) were operating; that since December 1953 CBS had been studying UHF markets preparatory to an expected change in Commission rules that would allow it to purchase two UHF stations in addition to its five VHF ones; that its staff rated Pittsburgh, St. Louis, New Haven-Hartford, and Milwaukee, in that order, as the most attractive; that CBS chose to enter the latter market and to buy WOKY rather than operating in Milwaukee on the third available channel; that WCAN's profitable operation in 1954, even with lower rates and competition from WOKY, was "immediately converted to a losing" one, although in 1955 WOKY was out of business; and that this reported loss of about $130,000 under CBS operation in 1955 contrasted sharply with the 66% increase in its profits nationally. Furthermore, reports in the record from CBS itself show that it always had recognized "a VHF station . . . would be preferable to a UHF . . . ." but that the latter had "specially good *short term* prospects" (emphasis supplied) in Milwaukee because it had "the characteristic of being at present (1954) a single station market." CBS further recognized that since its programming was "already working to build up UHF population . . . [through WCAN] there would be no short term loss to the network in continuing to give the support of CBS programming to the buildup of a UHF population . . . *at least until more VHF stations come in.*" (Emphasis supplied.)

The record indicates that Poller had built up a profitable UHF operation, which was recognized "as the most successful" in the United States. Even CBS officials pointed to it as an example of how "a vigorously and

aggressively managed UHF station can do well." In the short period of a year its public acceptance in Milwaukee was so great that 90% of the 260,000 TV sets in the area had been modified, at an expense of some $20 to each owner, so as to be able to receive UHF signals. While CBS had refused to enlarge the six month cancellation clause, at no time prior to the alleged conspiracy did it indicate an intention to cancel the WCAN affiliation.* It was, Poller claims, only pursuant to the conspiracy that CBS came into the Milwaukee market and eliminated both WCAN and WOKY. Since that time the total number of commercial UHF stations in the United States has steadily declined from 121 at the end of 1953 to 94 by midyear 1956. At the close of 1957 the number was only 88. In 1958 CBS itself abandoned a UHF station in Hartford, and in 1959 the very station in controversy here was likewise abandoned, leaving Milwaukee with no commercial UHF service. Instead, CBS has switched to VHF, affiliating with a Storer Broadcasting Company station which was authorized there the same year. It will be remembered that Mr. Storer is the same prospect who, Poller claims, indicated he would pay $2,000,000 for WCAN when the multiple rule was adopted but who cooled after a CBS warning. All of this may not be sufficient to warrant the finding that Poller contends for on this charge, but it does indicate more than fantasy, particularly in the light of the testimony of CBS Vice President Salant in his deposition that "it would be the kiss of death to UHF if either NBC or CBS abandoned a UHF station."

It may be that upon all of the evidence a jury would be with the respondents. But we cannot say on this record that "it is quite clear what the truth is." Cer-

* Indeed, such action would be unreasonable in light of the success of Midwest's initial operation and its highly favorable prospects with the expanded facilities and new equipment.

tainly there is no conclusive evidence supporting the respondents' theory. We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude here that it should not have been granted. We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.[7] It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice."

IV.

Other contentions of respondents are subject to ready disposition. They say that no restraint of trade resulted from CBS' termination of its affiliation with WCAN for this enabled it to support WOKY, the other UHF station in the Milwaukee area, which based upon Poller's own allegations was doomed without an affiliation. To the extent that this argument suggests that there is no violation of the antitrust laws because the public will still receive the same service, it has been foreclosed by this Court's decision in *Klor's* v. *Broadway-Hale Stores*, 359 U. S. 207 (1959). And if it is meant to say that there was no restraint because CBS in canceling its affiliation with WCAN was merely doing what it had a right to do and the resulting demise of WCAN followed from normal market conditions, it erroneously assumes that CBS had an absolute right despite violations of the antitrust laws to exercise its contractual privilege. See Part III, *supra*. A further answer to the respondents' conten-

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[7] Compare *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249, 256-257 (1948); *Arenas* v. *United States*, 322 U. S. 419, 434 (1944).

tion in this regard is that Poller has an additional claim that part of the conspiracy was the destruction of UHF entirely. The sole answer of CBS to that is "there is not a shred of evidence" to support such a charge. However, there has been no trial as yet, and the issue remains a factual one disputed under the pleadings and still undetermined.

CBS contends that the monopolization charges are frivolous. We find the record unclear on these claims. In view of our remand for a trial on the merits, we forego any comment thereon. The complaint does not allege the relevant market involved. In the trial court it was argued that UHF broadcasting in Milwaukee was the market, but on the record here we are unable to determine that issue. It may well be that on a trial appropriate allegations and proof can be adduced showing violations of § 2. See generally *International Boxing Club* v. *United States*, 358 U. S. 242, 249–252 (1959); *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 648–654 (1957) (dissenting opinion). We believe it to be good judicial administration to withhold decision on these issues.

Reversed and remanded.

SUPREME COURT OF THE UNITED STATES

No. 45.—October Term, 1961.

Lou Poller, Petitioner, v. Columbia Broadcasting System, Inc., et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[February 19, 1962.]

Mr. Justice Harlan, with whom Mr. Justice Frankfurter, Mr. Justice Whittaker and Mr. Justice Stewart join, dissenting.

As I see it, this is one of those cases, not unfamiliar in treble-damage litigation, where injury resulting from normal business hazards is sought to be made redressable by casting the affair in antitrust terms. I think that the antitrust laws do not fit this case, and that the courts below were quite correct in holding that the respondents were entitled to judgment as a matter of law.

The litigation arises out of CBS' cancellation of an affiliation arrangement with WCAN, a UHF television broadcasting station in Milwaukee, owned by Midwest Broadcasting Company of whose property Poller is assignee. CBS maintains that such cancellation was but the legitimate exercise of a contractual right. Poller says that it was part of a conspiracy to restrain and monopolize trade in the television broadcasting business, violative of §§ 1 and 2 of the Sherman Act. Suing under § 4 of the Clayton Act,[1] Poller seeks to recover as damages the trebled fair value of the WCAN station and equipment, whose sale to CBS at a distress price he claims was forced upon him in consequence of CBS' cancellation of the WCAN affiliation contract.

[1] That section, 15 U. S. C. § 15, gives a private right of action to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws."

Poller asserts that CBS, joined by others as conspirators, wanted to put him out of business as the first step in a grand design to destroy UHF broadcasting in Milwaukee, if not indeed throughout the United States. It is said that CBS looked with disfavor upon the growth of UHF broadcasting, being itself already heavily committed to VHF. As subsidiary steps towards the effectuation of this plan, it is charged that CBS chilled prospective purchasers of WCAN; acquired the only then competing UHF station in Milwaukee, WOKY; and later closed that station down.[2] CBS' co-conspirators are said to have been CBS-Television, an unincorporated division of CBS; certain officers of CBS; Bartell, the then owner of WOKY; and Holt, a management consultant, who at CBS' behest obtained from Bartell an option to purchase WOKY.

I assume that Poller would be entitled to proceed to trial if the record before the District Court had left open a genuine question of fact as to whether the alleged conspiracy had as its object the elimination of all UHF stations in the Milwaukee area, or even if it appeared that petitioner might prove that the respondents entered upon this course in order to reduce the number of UHF stations in Milwaukee from two to one, which was to be owned outright by CBS.[3] But for reasons given below, I think

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[2] The last of these allegations was not included in the complaint since the station acquired by CBS did not cease operations until after this suit was brought. It was alleged, however, in petitioner's supplemental affidavit in response to the motion for summary judgment.

[3] If such issues of fact were open and petitioner could prove at the trial that respondents' motives were unlawful, I think it would still be incumbent upon him to prove that the disaffiliation of WCAN was part of the illegal scheme. There is evidence in the record, not contradicted, tending to show that CBS would have canceled that affiliation without regard to its purchase of the Bartell station. If so, much, if not all, of petitioner's alleged loss would have been incurred because of this unilateral act, and not "by reason of anything forbidden in the antitrust laws."

that the depositions and affidavits which were before the District Court disclosed to a practical certainty that such proof could not be made.

What did remain open to proof was an alleged arrangement among CBS, its television division, and its officers and agents whereby CBS canceled an affiliation with one UHF station and purchased the facilities of a competing station. Even if somewhere among those sought to be drawn into petitioner's net there can be found two independent actors whose meeting of minds would satisfy the usual conspiracy requirement of "plurality of parties,"[4] their agreement to carry out that design would not, in my view, of itself offend anything poscribed by §§ 1 or 2 of the Sherman Act.

I.

In passing on the motion for summary judgment, the District Court had before it more than the four affidavits of interested parties to which the Court's opinion seems especially to refer (*ante*, pp. 4, 9). In the record was the testimony of four key witnesses taken by pretrial depositions. Petitioner's counsel had examined Frank Stanton, President of CBS; Richard Salant, a Vice-President of CBS; and Thad Holt, who acted for CBS in procuring the option on the Bartell station.[5] Petitioner's testimony was also in the record in the form of a deposition taken

[4] While I do not reach respondents' contention that no consensual arrangement of any kind was shown, I must say that the Court has stretched very far in suggesting that Holt may have been a "conspirator." The record shows, beyond any real possibility of contradiction, that Holt was simply engaged by CBS to act for it, as undisclosed principal, in procuring from Bartell an option to purchase WOKY. So far as Bartell is concerned, it stands uncontroverted in the record that he never knew of CBS' interest in Holt's option until it was exercised by CBS.

[5] The record shows that the undisclosed employment of Holt was due to CBS' desire to keep its competitors, particularly the National Broadcasting Company, from knowledge of its intentions respecting WOKY. This is, of course, a perfectly normal business phenomenon.

by respondent's counsel, and two affidavits submitted in opposition to the motion for summary judgment. In addition, the record contained the respondents' answers to written interrogatories put by the petitioner. It is in light of this far from meager pretrial discovery that the appropriateness of summary judgment must be evaluated.

Federal Rule of Civil Procedure 56 (c) authorizes a District Court to enter summary judgment

> "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In so providing, the draftsmen of the Rule of course did not intend to cut off a litigant's right to a trial before the appropriate fact-finder if triable issues remained unresolved after the pleadings were closed and pretrial discovery had. *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620, 627; *Fountain* v. *Filson*, 336 U. S. 681. On the other hand, it is equally clear that their purpose was to obviate trials which would serve no useful purpose. In administering the Rule, the availability of pretrial discovery, as well as matter actually discovered, is a factor to be considered in determining whether a "genuine issue as to any material fact" is open. *E. g., Schneider* v. *McKesson & Robbins, Inc.*, 254 F. 2d 827, 831. Further, the Rule does not indicate that it is to be used any more "sparingly" in antitrust litigation (*ante*, p. 9) than in other kinds of litigation, or that its employment in antitrust cases is subject to more stringent criteria than in others. On the contrary, without reflecting in any way upon the good faith of this particular lawsuit, having regard to the special temptations that the statutory private antitrust remedy affords for the institution of vexatious litigation, and the inordinate amount of time that such cases sometimes demand of the trial courts, there is

good reason for giving the summary judgment rule its full legitimate sweep in this field.

In this case petitioner, the party opposing the motion, had complete access by means of pretrial discovery to all the evidence he could marshal at a trial on the merits.[6] Neither his cross-examination of hostile witnesses nor his own direct testimony by way of deposition and affidavit produced any evidence which would indicate that the respondents sought to accomplish anything more than to purchase for CBS a UHF station in Milwaukee. As the Court's opinion seems to recognize, such a purchase (accompanied by a cancellation of petitioner's station affiliation) would be unlawful only if "*conceived in a purpose* to unreasonably restrain trade, control a market, or monopolize." (*Ante*, p. 5.) (Emphasis added.) In other words, unless a purpose to cancel petitioner's affiliation and purchase the Bartell station would, by itself, be unlawful, petitioner could prevail in this suit only if he proved that the respondents *intended* to stifle competition in, or monopolize, television broadcasting, either by closing down his station or, more broadly, by destroying the UHF business in whole or in part.[7]

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[6] There is no suggestion that petitioner was not afforded opportunity to examine any witness he wanted, either before or after respondents made their motion for summary judgment.

[7] The assertion that respondents sought to destroy "the UHF industry . . . because of the enormous economic investment they had in VHF," upon which the Court relies (*ante*, p. 5), was not made in any of the papers filed with the District Court. It was first raised during oral argument on the motion for summary judgment. There is nothing in the record to support this charge except the hindsight inference arising from the fact that after *four* years of operating the UHF station in Milwaukee, CBS discontinued it, claiming that the VHF competition was too powerful.

The Court's opinion takes out of context certain statements in a CBS report and infers from them that CBS was intending to make only a short-term venture out of its UHF purchase. But a full

This crucial issue, therefore, turns on proof of the respondents' motives. Had petitioner proceeded to trial and introduced no more evidence of motive than was revealed by the pretrial depositions and affidavits, the case, in my opinion, could not well have been permitted to go to the jury. There being no extrinsic evidence of an unlawful purpose, and CBS' executives having unequivocally denied any purpose to eliminate petitioner as a competitor, the jury would be left with no affirmative evidence of any intent to restrain trade. The possibility that the jury might disbelieve the respondents' assertions of innocence is not enough to forestall the entry of summary judgment in their favor. *Dyer* v. *McDougall*, 201 F. 2d 265.

Despite the ample opportunity afforded him by the availability of pretrial discovery procedures, petitioner, as will be shown, was able to produce no evidence to support his charges that a conspiracy, narrow or far-reaching, had been hatched. He should not be permitted to proceed to trial just on the hope that in the more formal atmosphere of the courtroom witnesses will revise their testimony or

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reading of the report in question, which was appended to petitioner's affidavit in opposition to the motion for summary judgment, reveals that CBS rejected the suggestion that it purchase a UHF station in a market that was primarily VHF, for the very reason that it would have only short-term advantages. Moreover, the Court's construction of the passage on which it relies hardly reflects its real meaning. The central question on which the report focused was "the degree of short-term cost and inconvenience that is to be undergone in order to obtain the eventual gain" in the purchase of a UHF station. In this context, the report noted that CBS television programs, broadcast by a CBS affiliate in the area (*i. e.*, WCAN), had already built up a UHF viewing market, so that the losses that might be expected at the outset of any such venture would be minimized. The inference is that it would be wise for CBS to capitalize on this headstart before it was cut into by more VHF stations, not that CBS should purchase the station and abandon it as soon as other VHF stations entered the market.

that a clever trial tactic will produce helpful evidence. Courts do not exist to afford opportunities for such litigating gambles. See *Radio City Music Hall Corp.* v. *United States*, 135 F. 2d 715; *Schneider* v. *McKesson & Robbins, Inc.*, *supra*; cf. *Orvis* v. *Brickman*, 196 F. 2d 762, 765–766; *Lavine* v. *Shapiro*, 257 F. 2d 14, 20–21.

II.

I find nothing in this record to support a claim that CBS, in proceeding as it did, was actuated by a desire to restrain or monopolize trade.

It appears from questions asked of Stanton and Salant, two CBS officers, that petitioner sought to imply an unlawful motive to destroy competition from CBS' failure to negotiate with him in the first instance for the purchase of WCAN. Were it shown that respondents refused to consider purchasing petitioner's instead of Bartell's station, although the former was available on satisfactory terms, such a showing might be some evidence of an intent to eliminate petitioner as a competitor of the other station bought by CBS. But the record shows that respondents throughout insisted that their refusal to deal with petitioner was the result of information that he had placed an exorbitant price on his station. That insistence, which Poller did not controvert or himself impugn, is confirmed by his own computation of damages in this case, as well as by his deposition testimony which reveals that he valued the WCAN property at $2,000,000 and demanded that price of all interested purchasers. CBS bought the Bartell station, although to be sure it had substantially inferior facilities, for $335,000.

Nor is there any evidence in the record to indicate that the respondents anticipated petitioner's offer to sell his facilities to CBS. It is clear from the affidavits and depositions, and is, in fact, conceded in petitioner's brief before this Court, that it was petitioner who initiated the negotiations and "importuned CBS to take his

equipment off his hands." Petitioner contends that the respondents knew he would have no use for the recently enlarged plant once his CBS affiliation was canceled, so that his offer of sale was a necessary consequence of the disaffiliation. But this proves only that petitioner's injury may as readily have been the result of CBS' lawful program of expansion as of an invidious scheme to restrain competition. It buttresses the conclusion reached by the Court of Appeals (284 F. 2d 599, 602, 605) that the diminution in the value of petitioner's property was attributable to petitioner's imprudent investment [8] rather than to any antitrust conspiracy by the respondents. In addition, petitioner's surmise that the respondents must have known that the cancellation of Poller's affiliation would result in his offering his equipment to CBS is hardly consistent with the fact, sworn to by Salant and never traversed, that CBS had its engineering department draw up complete plans as to how the Bartell facilities could be expanded to make them suitable for CBS' intended use.

Finally, it is entirely clear from the record that petitioner was unable to prove that the respondents' motive was to eliminate his station. It is undisputed that at the time Holt obtained the option on the Bartell station both the American Broadcasting and DuMont networks had no primary affiliates in the Milwaukee market. There is nothing to indicate that respondents should have anticipated at the birth of their alleged conspiracy that such affiliations would be unavailable to petitioner if the CBS tie were broken. Moreover, it is patent from the terms

[8] The record shows that Poller from the beginning had unsuccessfully tried to persuade CBS to enlarge the term of his affiliation contract cancellation clause from six months to two years, and that, with eyes thus open, he nonetheless proceeded with his substantial equipment investment.

of the contract under which CBS purchased petitioner's equipment that petitioner represented to the respondents that he would continue broadcasting operations as an independent from the studio formerly occupied by Bartell.[*] It was only after this representation was made, albeit, as petitioner now claims, with only "about a 5 per cent hope" that he would be able to continue, that the exchange of facilities was consummated. The transaction was in all ways consistent with the parties' written intention to maintain *two* operating UHF stations in Milwaukee. For it was surely much more likely that petitioner could survive as an independent by using the smaller Bartell plant than by remaining in his enlarged studio, which had absorbed a large amount of capital that could not, at least immediately, be put to fruitful use.

In sum, the District Court had before it on this motion for summary judgment a record on which it was apparent that petitioner could prove only that CBS had undertaken to cancel its affiliation with petitioner's station and, with Holt's assistance, to purchase a competing UHF station. Only if such a "conspiracy" is prohibited by §§ 1 or 2 of the Sherman Act should the petitioner have been permitted to proceed to trial.

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[*] One of the introductory clauses of the contract provided:

"WHEREAS, Midwest [petitioner] has represented to CBS that Midwest intends to continue the operation of WCAN and all business incidental thereto, and for that purpose CBS proposes to make the sale and transfers hereinafter set forth; . . ."

I find no persuasive basis in the record for petitioner's assertion that this was designed as a self-serving declaration to cloak CBS' alleged antitrust malefactions. By that same contract CBS sold to Poller the WOKY equipment, in part consideration for the purchase of his equipment, the thought quite evidently being that such equipment would suffice for his continued operations, while the superior WCAN equipment would relieve CBS from the necessity of completely re-equipping WOKY.

III.

Respondents freely admit that the purchase of the Bartell station and the cancellation of petitioner's affiliation were parts of one course of action. They maintain, however, that their intention was to purchase a UHF station in Milwaukee as the first step in an incipient program of expansion into the UHF market, made possible by the Federal Communication Commission's then recently adopted "5-and-2" amendment to its multiple ownership rule. By reason of this amendment, a single licensee was permitted to own two UHF stations in addition to the maximum five VHF stations theretofore allowed. I would hold that an arrangement to attain this objective did not, of itself, violate § 1 of the Sherman Act.

It must be obvious that the cancellation of an affiliation agreement by one network, not acting in concert with any other, does not alone give rise to a cause of action under the antitrust laws. *Federal Broadcasting System, Inc.*, v. *American Broadcasting Co.*, 167 F. 2d 349. A network is surely free to cut its ties to one station and affiliate with another in the same market. Such an act is analogous to a manufacturer's transfer of an exclusive distributorship from one dealer in the market to another. This freedom to choose with whom one deals is preserved under the antitrust laws not only because it is a unilateral decision, but because it does not amount to an unreasonable restraint of trade in any meaningful sense of the term, cf. *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F. 2d 418; *Fargo Glass & Paint Co.* v. *Globe American Corp.*, 201 F. 2d 534.

To overcome these apparent barriers to any holding that § 1 of the Sherman Act was here violated, petitioner suggests two theories under which respondents' conduct might constitute a forbidden restraint of trade: (1) That by reason of the "leverage of its network power" CBS was

able to restrain trade among the independently owned UHF stations in the Milwaukee area; and (2) that CBS' purchase of a television station amounted, *per se*, to an unreasonable restraint of trade. How either of these alleged restraints, assuming they are unlawful, caused petitioner's alleged loss is left a mystery. Regardless of any question of causation, however, petitioner can prevail on neither theory.

To the extent that the "leverage" complained of charges CBS with monopolizing a market, petitioner's claim falls under § 2, a matter to which I will revert in a moment. *Infra*, pp. 12–13. Apart from monopoly power, the respondents could have violated the antitrust laws only by conspiring in some manner to use CBS' "leverage" to restrain trade. Clearly, the disaffiliation alone was not an unlawful use of the network's power. Having built up the value of his station substantially because of its CBS affiliation, petitioner is hardly in a position to claim that by depriving him, in the exercise of a contract right, of the benefit of such an affiliation CBS was unreasonably exercising its superior power to restrain trade. And there is no indication in the record that this "leverage" in any way affected the purchase price of petitioner's equipment, even were it to be assumed that the respondents foresaw that petitioner would be willing to sell. The charges here are unlike those in *United States* v. *Radio Corporation of America*, 158 F. Supp. 333, reversed, 358 U. S. 334, in which the Government sought to enjoin, as violating § 1, a network's attempt to coerce an independent owner into selling his station to the network under threat of canceling the network's affiliation with other stations under the same ownership. In this case there is no claim made that CBS conditioned the continuation of some network service upon petitioner's consent to sell his equipment, or on his willingness to reduce his price.

Nor can I agree that the contract whereby CBS became a station owner in the Milwaukee market was, in and of itself, a contract in restraint of trade. Petitioner is unable to point to any convincing differences between the vertical integration that is accomplished when a network purchases a station and that which results from an affiliation contract. Moreover, the very contention now being made here by the petitioner has repeatedly been presented to the Federal Communications Commission, and that agency has consistently adhered to the view that network ownership of stations, subject, of course, to the maximum-ownership limitation, is not contrary to the public interest. *E. g., ABC–Paramount Merger*, 8 Pike & Fischer R. R. 541; *St. Louis Telecast, Inc.*, 12 Pike & Fischer R. R. 1289, 1372; *National Broadcasting Co.*, 20 Pike & Fischer R. R. 411, 419.

This Court has also been reluctant to hold that vertical expansion alone can amount to an unreasonable restraint prohibited by § 1 of the Sherman Act. *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 173–174; *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 525. Without of course suggesting that the Federal Communications Commission has authority to alleviate an applicant for a station license from the requirements of the antitrust laws, *United States* v *Radio Corporation of America*, 358 U. S. 334, in light of the uniform course of decisions by the agency familiar with the field, and in the absence of any indication that this particular purchase *in fact* restrained trade, I think it is clear that petitioner's injury, even if it be assumed partially attributable to CBS' purchase, may not be made the basis of a treble-damage action.

Petitioner's § 2 claim is if anything even more insubstantial. He contends that respondents conspired to monopolize the UHF market in Milwaukee, and perhaps across the country, and that they succeeded in their attempt, at least in Milwaukee. But it is undisputed that

the television sets being produced and sold in the Milwaukee area at the time of the alleged conspiracy were all equipped to receive VHF broadcasts and could be adapted to receive UHF signals as well. Thus, any UHF station was necessarily in competition with all VHF stations in the market with respect to both the viewing and the advertising public. Indeed, as the record uncontrovertedly shows, the CBS station ultimately succumbed because the VHF competition was too strong. Since CBS was patently not a monopolist in the Milwaukee market (which included both UHF and VHF), and since there was no allegation that it approached monopoly power in any other market in which petitioner was a competitor, the entry of summary judgment in favor of the respondents on this claim too was eminently correct.

I have gone into this matter at some length because in my opinion the Court's encouragement of this sort of antitrust "enforcement" does disservice to the healthy observance of these laws. I would affirm.